Appendix A

United States Court of Appeals for the Ninth Circuit

No. 21,340

MATSON NAVIGATION COMPANY,
Appellant,

vs.

JOHN T. CONNOR, Secretary of Commerce,
Appellee.

[May 17, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and ELY, Circuit Judges,
and BYRNE, Senior District Judge*

PER CURIAM:

Our examination of the record, the opinion of the Secretary, the briefs, the statutes and the applicable authorities leads us to the conclusion that the case was correctly decided by the District Court. Accordingly, and for the reasons stated by Judge Wollenberg in his opinion, *Matson Nav. Co. v. Connor,* D.C.N.D. Cal., 1966, 258 F.Supp. 144, the judgment appealed from is affirmed.

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*Honorable William M. Byrne, Senior District Judge, United States District Court, Central District, California, sitting by designation.

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MATSON NAVIGATION COMPANY,
Appellant,

vs.

JOHN T. CONNOR, Secretary of Commerce,
Appellee.

Appeal from the United States District Court for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 17, 1968

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, June 21, 1968

Before: DUNIWAY and ELY, Circuit Judges,
and BYRNE, Senior District Judge*

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant filed June 17, 1968, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

*Honorable William M. Byrne, Senior District Judge, United States District Court, Central District, California, sitting by designation.

Appendix B

In the United States District Court for the Northern District of California, Southern Division

Filed—Aug 10 1966

Civil No. 44080

MATSON NAVIGATION COMPANY,
Plaintiff,

vs.

JOHN T. CONNOR, Secretary of Commerce,
Defendant,

STATES STEAMSHIP COMPANY,
Intervenor Defendant,

SAN DIEGO UNIFIED PORT DISTRICT,
Intervenor Defendant,

MEMORANDUM OPINION AND ORDER

Matson Navigation Company has asked this Court to set aside Secretary of Commerce Connor's order (hereinafter S.C.D.) granting an application of the States Steamship Company, a subsidized operator, for permission to double its sailings (from 13 to 26) in the domestic California-Hawaii trade in competition with Matson, an unsubsidized exclusively domestic operator in that trade.[1] States Steam-

1. The Merchant Marine Act (the "Act") 46 U.S.C. 1101-1294 as amended, provides for the subsidy of American ships in foreign operation if they meet certain requirements. Construction-differential subsidy (CDS) is paid to make the cost of United States built ships to the American-flag owner comparable to his foreign-flag competitor's overseas construction costs. 46 U.S.C. 1151-1161. Operating-differential subsidy (ODS) is the subsidy paid to establish operating cost parity between contractors and their foreign-flag competitors. 46 U.S.C. 1171-1182. States Steamship Company has received sizable amounts of dollar subsidy under both ODS and CDS provisions. Matson, an unsubsidized exclusively domestic operator in the California-Hawaii trade has received no subsidy for its operations in that area.

ship Company (States) and the San Diego Unified Port District have joined the United States in opposing the motion as intervenor defendants. These defendants have filed cross motions for summary judgment in favor of the Secretary of Commerce. The issue before this Court is whether the Secretary's decision is supported by substantial evidence and whether it applied legal standards consistent with the Congressional intent embodied in the Merchant Marine Act of 1936.

States Steamship Company (hereinafter "States") operates a subsidized shipping service between California and the Far East. In January, 1961, States filed with the Federal Maritime Board[2] an application for permission under Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C.A. Sec. 1223(a) to increase its intermediate service between California and Hawaii from 13[3] to 26 calls per year in each direction on the sailings of its subsidized ships on Trade Route 29, between California and the Far East. The Harbor Commission of the City of San Diego intervened in behalf of the applicant; Matson Navigation Company (hereinafter "Matson") and the State of Hawaii intervened in opposition. During the next five years, after the submission of the application, five different administrative decisions, some granting and some denying the application were issued respectively by the Hearing Examiner of the

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2. By authority of Reorganization Plan No. 7 of 1961, effective August 12, 1961, the Maritime Subsidy Board succeeded the Federal Maritime Board as to jurisdiction over the States Application herein.

3. In January, 1953, States was granted permission under Sec. 805(a) to make 13 domestic calls at Hawaii in each direction. *Pacific Transport Lines, Inc. Sec. 805(a) Application, Docket S-18 (Sub. No. 1).* Matson made no objection to the original grant of 13 calls. It is only the 13 additional calls applied for in 1961 which are at issue in this case.

Maritime Commission (March, 1963), the Maritime Subsidy Board (Oct. 7, 1963), Secretary Hodges (Apr. 1964), Review Examiner (Mar. 1, 1964), and Secretary Connor (July 6, 1965)[4].

The case now has reached epic proportions in its duration and in the sheer volume of its certified record which could seemingly fill the largest hull of any of the carriers involved.[5] The conflicting administrative decisions reflect the general disagreement over the order of importance which

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4. Briefly the history of the disposition of the disputed application below went as follows: In March, 1963, the Hearing Examiner served his Recommended Decision, concluding that to grant States' application would result in unfair competition to Matson and be prejudicial to the objects and policies of the Act. The maritime Subsidy Board took the decision under review, and in a Final Opinion and Order, (decided Oct. 7, 1963) the Board rejected the Recommended Decision and granted the requested permission. The Secretary of Commerce (then Hodges) decided on Jan. 6, 1964 to stay the Board's action and to review the Board's Opinion and Order. Secretary Hodges found on Apr. 23, 1964 that the Board's decision would be prejudicial to the objects and policies of the Act. Secretary Hodges however did authorize States to make the additional calls requested but subject to a condition that the right of refusal upon two weeks notice be given to the unsubsidized operators in the trade. In Dec. 1964 Secretary Hodges set aside his earlier decision and designated a Review Examiner to further consider the application. The Review Examiner concluded that no permission is required under 805(a) where a subsidized operator in foreign trade wishes to make intermediate calls at Hawaii on subsidized voyages, because Secs. 605(a) and 506 grant express permission for such mixed voyages and provide protection for exclusively domestic carriers through pro-rata reduction and refund of subsidy for the domestic portion of the mixed voyage. Exceptions to the Review Examiners decision were taken by Matson and Hawaii. The case then went to Secretary Connor (who had succeeded Secretary Hodges) for decision, against a background of four previous decisions at various administrative levels, two of which approved States' application and two of which denied the application.

5. The agency proceedings alone produced 7,718 pages of transcripts of hearings and testimony. Over 2,500 printed pages of written argument in briefs have been submitted along the line of review.

the various avowed purposes of the Merchant Marine Act should be given. Somewhere in the numerous decisions rendered each party of interest was able to glean a supportive theory and attest to its justness in the light of reason and legislative history. However, since this Court need only consider the final order issued by Secretary Connor granting the application of States, it is unnecessary to discuss here the prior orders and recommendations by the other administrative officials except as they were expressly relied upon by the Secretary. All this Court can do with this case as it rests here on its long journey toward ultimate disposition is to test the Secretary's decision under the proper scope of judicial review.

This Court is mindful of its carefully restricted task in reviewing the Secretary's decision. While the Court is not obliged to stand aside and rubber stamp its affirmance of administrative decisions, which it deems inconsistent with a statutory mandate, *N.L.R.B. v. Brown,* 380 U.S. 291 (1965); it must at the same time guard against the danger of "sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 194 (1941). Where findings of fact are concerned the scope of review extends only to an inquiry as to whether there is substantial evidence in the record to support them. The Court may not weigh the evidence anew and substitute its judgment for that of the Secretary. *Minneapolis & St. Louis R. Co. v. United States,* 361 U.S. 173, 189 (1959). As to any new standard of operation or policy judgment adopted by the Secretary in his decision, the Court must be satisfied that such standard is consistent with the authority and discretion granted by Congress. *National Broadcasting Co. v. United States,* 319 U.S. 190, 224. The wisdom of the principle adopted is not

this reviewing Court's concern as long as it has a definitely rational and statutory foundation. *Securities Commission v. Chenery Corp.*, 332 U.S. 194, 207 (1946). "Nevertheless where a newly adopted standard involves a major policy judgment as to the balance to be struck between conflicting interests, the Court must scrutinize it with care and strike it down if it results in an unauthorized assumption by the Secretary of major policy decisions properly made by Congress." *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300 (1965).

The Secretary's decision, herein challenged, granted States permission under Section 805(a) to increase its intermediate service between California and Hawaii from 13 to 26 calls per year on the sailings of its subsidized ships on Trade Route 29 between California and the Far East. In reaching his decision, the Secretary found that approval of State's application would not result in unfair competition to Matson within the meaning of Section 805(a) and that approval of State's application would not be prejudicial to the object and policy of the Act within the meaning of Section 805(a).[6] Matson has vigorously attacked both findings

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6. Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C.A. Sec. 1223(a), forbids the payment of a subsidy to any person who, without written permission from the Board, owns or operates vessels "in the domestic intercoastal or coastwise service", which of course includes the California-Hawaii trade that States seeks to enter. Persons interested in an application for such permission are authorized to intervene before the Board and the Board is required to "give a hearing to the applicant and the intervenors". The Board is not to grant permission if the Board "finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter." It is made a misdemeanor for one who has received such permission "to divert directly or indirectly, any moneys . . . used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operation . . .".

as being contrary to the policies of the Act, inconsistent with legal precedent, and unsupported by substantial evidence. This Court has carefully considered all of the arguments suggested by the protesting carrier Matson. However, for the reasons given below, the Court holds that the Secretary's findings are warranted by law, are supported by substantial evidence, and are clearly within the authorized discretion and statutory responsibility of the administrative agency.

The Secretary concluded that no unfair competition to Matson would result if States application were granted. In arriving at this conclusion, the Secretary conceded that States, the subsidized operator, would have a residual subsidy benefit to some degree supporting its domestic service (California-Hawaii). However, the Secretary maintained that "equalizing forces" such as statutory and contractual restrictions on States, "government aid in various forms to domestic operators" (Matson) and potential "growth in the trade" were to be weighed in the balance. (S.C.D. p.53). The decision concludes that States' additional sailings would "not seem to pose a serious threat" and "would not have such a competitive effect on Matson as to lessen substantially the ability of Matson to compete for available cargo." (S.C.D. p.63). Thus the Secretary, in defining unfair competition, adopted a new standard or test of "substantial competitive advantage" while applying Section 805(a) to a subsidized carrier engaged in a "mixed voyage".[7] The ulti-

7. A mixed voyage is one on which the vessel is operated in both the domestic and subsidized foreign trades on the same voyage. The mixed voyage situation carries with it two inherent possibilities flowing from the proration formulas established by Secs. 506 and 605(a) of the Act. (providing for subsidy proration according to the degree of domestic operation) . . There is first the possibility that proration will not remove all subsidy from the contractor's operations along the domestic portion of the mixed

mate disposition of this case depends almost totally on whether this new standard or test is consistent with the statutory mandates of Section 805(a) and whether its adoption can be rationally derived from the Congressional intent embodied in the Merchant Marine Act. As stated above, the establishment by an Agency of a new standard which involves such a major policy judgment must be closely scrutinized by a reviewing court against the statutory language, the legislative intent, and the applicable case law.

Turning first to the statutory language, Section 805(a) specifically requires the denial of permission for subsidized vessels to operate in the domestic trade if such permission would result in "unfair competition" to exclusively domestic operators. However, "unfair competition" is not defined in the Act. This is not unusual where a statute gives an agency a broad policy directive, such as the maintenance of both domestic and foreign water borne commerce and promotion of a merchant marine capable of serving as a naval and military auxiliary in time of war or national emergency. (Section 101 of the Act). In such cases it is customary to state the policy ends broadly and leave to the agency the adaption of means to the desired end. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941), *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943), *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947), *Swayne & Hoyt, Ltd., v. U.S.*, 300 U.S. 297 (1937), *Mitchell v. Budd*, 350 U.S. 473, 480 (1956).

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voyage but that a residue may remain as in this case. There is second the further possibility that such residual subsidy will exceed the contractor's need for support of his carriage of cargo in the foreign trade along the domestic portion of the mixed voyage. If so it would be available to help the contractor in domestic trade and, if large enough to create unfair competition or prejudice to the objects and policy of the Act, would require denial of the application. (S.C.D. pp. 35, 39-40).

Where general and imprecise terminology is inserted in a statute, the agency must have broad discretionary power to protect the multiple interests at stake.

Sections 506 and 605(a) of the Act contemplate exceptions to the general scheme of allowing subsidy for foreign operations only. These exceptions exist as to vessels on four specified kinds of mixed voyages, including vessels on "a voyage in foreign trade on which the vessel may stop at the State of Hawaii" providing subsidy is prorated according to domestic operation.[8] Yet Section 805(a) directs the Secretary not to permit the operation of subsidized vessels in domestic waters if he "finds it will result in unfair competition" to exclusively domestic operators, or that it would be "prejudicial to the objects and policies of this Act." The three sections of the Act are not irreconciliable as some of the parties have contended. In sections 506 and 605(a) Congress clearly contemplated that Hawaii might be called at by subsidized vessels in the mixed trade, provided that their operators complied with the plan provided for subsidy proration. In Section 805(a) Congress added the further requirement that such mixed calls would not result in unfair competition for exclusively domestic operators. Thus the exclusive domestic operator is given a double protection from the subsidized carrier. First the subsidized carrier is required to return a portion of its ODS and CDS according to the statutory formula. If after the rebate there is still a residue of subsidy benefit in any form remaining, and if that benefit would be likely to result in unfair competition to the

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8. Proration is the diminution of subsidy to a contractor engaging in a mixed trade. It is achieved by the refund of construction-differential subsidy (CDS) and reduction of operational-differential subsidy (ODS) according to statutory formulas set out in Sections 506 and 605(a) of the Act. 46 U.S.C. 1156 and 1175(a) respectively.

domestic operator, then the subsidized carrier is to be denied entry into the domestic market.

The Secretary in this case found that even after proration under 506 and 605(a), there was some residual subsidy benefit to States. He, therefore, had to decide whether States residual benefit would result in "unfair competition" to Matson. He had to face for the first time the competitive situation presented by States mixed service. He concluded that no unfair competition would result since the admitted competitive advantage arising out of the residual subsidy when tempered by certain equalizing factors would, in his opinion be insubstantial. In concluding that the statute permitted him to adopt the standard of "substantial competitive advantage" as the cutoff point for admissibility of subsidized vessels into the domestic waters, the Secretary rejected Matson's position urged before him on this point.[9] Matson contended that any subsidy at all (more than de minimus) which might remain to the subsidized applicant with regard to the domestic trade after proration under Section 506 and 605(a) had occurred would be per se unfair to unsubsidized operators in that trade regardless of equal-

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9. The Secretary in his decision also rejected the position advocated by States and adopted by the Review Examiner. States had urged that by including in Sections 506 and 605(a) of the Act provisions for subsidy proration Congress intended as a matter of law to eliminate in the mixed voyage type of case any question of unfair competition flowing from subsidy support of domestic operation by the applicant in competition with an unsubsidized operator in the same domestic trade. The Secretary said in his opinion at p. 35: "to adopt the theory that, although 805(a) is assumed to apply, 506 and 605(a) subsidy proration provisions as a matter of *law* eliminate unfair competition from subsidy despite what the consequences may be as a matter of fact to the unsubsidized domestic operator, would imply an unawareness or a disregard on the part of Congress of the unfairness of situations even where substantial subsidy remaining after proration is used to significant advantage over an unsubsidized operator in a domestic trade. I am unwilling to imply such unawareness or disregard to Congress and I do not adopt the theory."

izing factors. (Matson memo pp. 41, 48). In support of its position, Matson cited the legislative history and case law surrounding Section 805(a) which it construed to be at odds with the Secretary's new standard of unfair competition. The Court rejects Matson's contentions.

The purposes surrounding the enactment of the Merchant Marine Act of 1936 as announced by both the administration, the Congress and Section 101 of the Act were to promote and develop a strong American merchant marine to serve American shippers in time of peace, to provide for the continuance of neutral peaceful trade in time of war in which the United States was not involved, and to provide naval auxiliaries and the maintenance of necessary and commercial intercourse in time of war in which the United States was involved. Accordingly, the 1936 Act was primarily designed to develop the carriage of the nation's foreign commerce by United States flag vessels in time of war and peace through payment of construction subsidy and operating subsidy for use in competition with lower cost foreign flag vessels. Another important purpose of the Act was to promote the maintenance of an unsubsidized, privately owned merchant fleet sufficient to carry the nation's "domestic water-borne commerce" (Section 101 of the Act.) In connection with this aim, Congress sought to curb abuses in the operation of the pre-1936 Government subsidy program, particularly the mail subsidies system. These abuses (which had harmed the unsubsidized operators) included "the improper operating of subsidiary companies, the payment of excessive salaries, the engaging in businesses not directly a part of shipping, and other abuses which have made for poor management, improper use of profits, and scattered efforts. (74th Cong., 1st Sess., House Document No. 118, March 4, 1935). The most common

abuses in the domestic trade under mail subsidy were clearly shown by the legislative history to relate to two distinct types: (1) the creation by the recipents of mail subsidies of subsidiary or affiliate corporations to operate in the domestic trade and to which to pipe subsidy funds from the parent contracting firm, and (2) subsidy payment to and receipt by contractors who were almost exclusively domestic in their operations because they happened to touch at a foreign port incidental to their domestic routes.[10] The Black and Farley Reports which led to adoption of Section 805(a) recommended that subsidy not be paid to an operator whose business or interests are in the domestic trade nor for the benefit of any operator whose financial or corporate structure permits subsidy diversion into other than bona-fide American flag foreign-trade shipping enterprises. (Investigation of Air Mail and Ocean Mail Contracts. Senate Report No. 898, 74th Cong. 1st Sess. (1935, p.14). In aggregate it may fairly be concluded that in addition to other primary objectives sought to be served, the Merchant Marine Act of 1936, was enacted to curb the many abuses disclosed by the Farley and Black Reports. It is also a fair summation

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10. From 1920 to 1936 millions of dollars of Government mail subsidies were paid, pursuant to the Merchant Marine Acts of 1920 and 1928, for the presumed purpose of maintaining United States flag service on the foreign trade routes. As matters developed, however, a substantial part of the Government funds paid out was diverted into the domestic trade and into the pockets of steamship operators. These abuses were disclosed in a series of investigations held first by Postmaster General Farley and then by a special Senate committee chaired by Senator Hugo Black. According to the Farley Report, "millions of dollars of mail pay had been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade resulting in unfair competition with nonsubsidized American lines in the same trade." (House Document No. 118, 74th Cong. 1st Sess. (1935) (p. 9). The Black Committee report was equally emphatic and stated:

> It surely cannot be contended that Congress ever intended mail contracts to be let on links of intercoastal routes wherein

of the legislative intent to conclude that Section 805(a) was intended to guard against potential abuses of the new ODS and CDS provisions contained in the 1936 Act.[11] However, there is nothing in the legislative history which requires the conclusion that Congress thought "unfair competition" necessarily would result from granting an 805(a) application to an operator seeking permission, while receiving subsidy, to serve one of the mixed foreign and domestic trades enumerated in Sections 506 and 605(a) when subsidy in any (for even something more than a de minimus) amount would remain, after proration, in the domestic segment.

To the contrary, it is quite reasonable to conclude from the Act and the legislative history that Congress did not regard a residual subsidy benefit in a mixed voyage as necessarily being unfair competition. Nowhere in Section 101 of the Act is there any suggestion of a policy against American-flag vessels promoting both the foreign and domestic commerce of the United States on the same voyage. In fact, Congress expressly showed its awareness of these objectives being obtained through such mixed voyages by providing in Sections 506 and 605(a) of the Act four specific and identical instances (including Hawaii) in which vessels

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the competition to be faced by the operator was only from other American interests. This was well known to Government officials administering the Merchant Marine Act of 1928, but despite that knowledge such contracts were let and are being operated. Thus there is placed in the hands of the favored contractor a murderous economic weapon to be used against his American competitors in a trade wherein vessels of foreign registry may not engage. (Investigation of Air Mail and Ocean Mail Contracts Senate Report No. 898, 74th Cong. 1st Sess. (1935), p. 14)

11. The concluding paragraph of Section 805(a) makes it unlawful and a misdemeanor—for a subsidized operator "to divert directly or indirectly, any moneys, property, or other thing of value, used in foreign trade operations, for which a subsidy is paid by the United States," into any "domestic operation".

engaged in such mixed foreign and domestic voyages would be eligible for both CDS and ODS, providing that CDS originally paid to the shipyard by the government was repaid by the ship operator and that ODS otherwise payable to the ship operator was reduced proportionately to such participation in domestic trade under a formula prescribed by Congress in those sections. The Defendant Secretary pointed out that these sections indicated Congress contemplated that it would be in the public interest for subsidized carriers to provide mixed service in those trades in some cases. (S.C.D. 73-74). It was even foreseen at the Congressional hearings that proration might not always remove all benefits of subsidy to an operator of a combination foreign-domestic service in competition with an unsubsidized operator in the domestic trade.[12] Aware of this possibility, Congress failed to promulgate legislation which expressly and specifically

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12. The Secretary referred to the fact that early drafts of Sections 506 and 605(a) containing refund and reduction of subsidy provisions, "resulted in protests by domestic operators on the ground of probable unfair advantages a subsidized operator would have in the mixed trades despite such protection." The Secretary said that the forerunners of Section 805(a) were added as an additional protection to unsubsidized operators. (S.C.D. pp. 14-15). See also the testimony of J. C. Peacock, Director of the U.S. Shipping Board Bureau, Dept. of Commerce. Hearings on S 3500, Committee on Commerce, Senate, 74th Cong. 2d Sess. (1936) pp. 75-76, which reflects an awareness of potential residual subsidy:

> Mr. Peacock: I think the provision that is made , . 506 and 605(a) is the best that can be made under the circumstances. After all, this is theoretical. I would not assume to say there might not be some cases where there was still some real discrimination left, and the importance of that has, I think to be judged in connection with what is the principal purpose of the bill.
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> The Chairman: Somebody might be pinched, but in case of a national emergency the national defense would be better preserved if we had ships, no matter where they operated in between times; is that your position?
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> Mr. Peacock: I think so, if that is the principal purpose of the bill.

outlawed *any residual subsidy*[13] and instead adopted the broader standard of "unfair competition" embodied in Section 805(a). Accordingly, the fairest reading of the provisions of the Act itself and the legislative history behind it indicate that because of the multiple purposes of the Act and because of the unforeseeable complexity and variety of competitive relationships which would be posed by applications under Section 805(a), Congress set forth no automatic or mechanical formulas and established no per se standards. Rather it entrusted the Secretary with considerable discretion in determining when unfair competition would result from a residual subsidy.

In reaching his decision, the Secretary carefully considered the opinion of the Court of Appeals for the District of Columbia in the PFEL case,[14] which is the only major case discussing unfair competition under Section 805(a). This Court agrees with the Secretary that the thrust of the *PFEL* case is its rejection of the doctrine of fundamental entitlement whereby domestic operators would be protected from competition which was not subsidized. Everything else in that opinion is dictum which in large part is inapplicable to the facts in this case. *PFEL* was not a mixed service case. It involved a subsidized operator's application for permission to operate unsubsidized vessels in domestic waters. There is no possibility in such a situation for residual subsidy passively to remain after proration from the subsidized operations to assist the separate unsubsidized operations. To the contrary, the case at bar presents the distinct

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13. Some of the bills introduced in Congress prior to enactment of the 1936 Act contained specific prohibitions against payment of subsidies to any carriers operating in the domestic trade. None of those provisions were retained in revised H.R. 8555, which became law. See H.R. 7854 (May 2, 1935) and H.R. 7981 (May 9, 1935).

14. *Pacific Far East Lines, Inc. v. Federal Maritime Board*, 275 F.2d 184 (D.C. Cir. 1960) Cert. Denied 363 U.S. 827.

situation of a mixed voyage with its inherent possibility of residual subsidy, without purposeful diversion. The Secretary's order is perfectly consistent with the language in *PFEL* relied on by Matson which broadly condemns "diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator".[15] That language merely reasserts the declared purposes of Section 805(a) to prevent deliberate shuffling of funds from subsidized to unsubsidized operations, and to ultimately provide substantial protection for domestic operators as against subsidized operators. The opinion in *PFEL* never considered, nor does the language embrace the unique mixed service situation specifically provided for in the Act by Sections 506 and 605(a). It never considered the degree or amount of inherent residual subsidy which might remain without disrupting the dual Congressional plan to sustain both the foreign and domestic trades. It directed its attention solely to the rejection of the doctrine of fundamental entitlement and to reaffirming the Congressional intent to prevent deliberate subsidy diversion. The Secretary correctly considered the *PFEL* opinion for what is was worth[16] when applied to "the mixed" voyage situation, and proceeded to adopt the standard of "substantial competitive advantage" as a test of unfair competition when dealing with a residual subsidy benefit to States.

As stated above, the Secretary was faced in this case with the relatively novel situation of a mixed service carrier

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15. Ibid p. 186.

16. The Secretary commented at p. 39: "Again, bearing in mind the factual differences in the *PFEL* situation and in the situation involved in this proceeding, I think that the Court's indication there that competitive advantage from subsidy is a relevant factor in determining whether unfair competition would result from granting an 805(a) application is a relevant factor to the unfair competition issue here." (S.C.D. p. 39).

having a residual subsidy benefit, increasing its domestic service. The factual makeup required the Secretary to define and apply the concept of "unfair competition" within Section 805(a) to a mixed service situation. Lacking any specific or express statutory language as a guide, the Secretary correctly looked to the over all purposes of the Act and the legislative history surrounding it. Putting aside the extreme positions on both sides, the Secretary objectively concluded that the Act was promulgated for the dual purposes of maintaining a highly effective Merchant Marine at all times and places (Section 101) while at the same time protecting the legitimate interests of exclusively domestic operators against the devious assault of subsidy diversion. [Section 805(a)]. Cognizant of these dual objectives and unrestricted by specific statutory mandate or judicial precedent, the Secretary correctly rejected a mechanical test of unfair competition. Rather, having concluded that the Act vested in him a wide range of discretion, the Secretary properly adopted a standard which was flexible enough to implement his discretion but restricted enough to substantially preserve in all cases the obvious protective intent of Section 805(a).[17] This Court, therefore concludes that the standard of "substantial competitive advantage" is the product of sound reason, administrative experience, appreciation of the complexities of the problem and a thorough understanding of the statutory policies, which constitutes an allowable administrative policy judgment undisturbable on judicial review.

Having adopted this new standard of unfair competition under Section 805(a), the Secretary proceeded to find that

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17. The secretary rejected the Board's extreme statement that a finding of unfair competition must be based on evidence that the resulting advantage of the subsidized operator over the domestic operator is "such an overwhelming unconscionable advantage as to constitute 'unfair competition'." (SCD p. 40)

if the application were granted States would not have a substantial competitive advantage over Matson as a result of its residual subsidy benefit. (S.C.D. p.53) Matson has strenuously objected to this finding. This Court having affirmed the Secretary's new standard must only inquire as to whether the Secretary's factual finding was supported by substantial evidence. *Minneapolis & St. Louis R. Co. v. U.S., supra.* The Court need not catalogue here the extensive findings set forth by the Secretary in his Order. (S.C.D. pp.41-53), nor will the Court substitute its judgment for that of the Secretary. It is sufficient to state the Court is satisfied that the record reveals the Secretary reached his conclusions on the basis of substantial relevant and legally admissable evidence.

In determining that States would not gain a substantial competitive advantage over Matson, the Secretary properly took into account the respective roles of Matson and States in the California-Hawaii trade. (S.C.D. p.41). He noted that the over all picture reflected that for many years Matson has been and is the predominant carrier in that trade. He found that Matson had been carrying nearly 1,500,000 tons of cargo annually in each direction in the trade, compared with States' (and its predecessor's) carryings ranging between only 7,926 and 22,430 short tons westbound and considerably less eastbound. He also found that Matson had been making up to 18 round voyages a month contrasted with about one a month by States. Additionally he found that other carriers entered the trade from time to time, but with little or no success against Matson's efficiency and established position. He concluded that Matson for a number of years past had carried about 98% of the cargo between Hawaii and the Pacific Coast, and that currently it was carrying about 95% of the liner cargo in the California-Hawaii trade.

Looking to the future, the Secretary stated that if States' application were granted and its annual calls increased by 13 in each direction, States' carrying in the California-Hawaii trade would increase by an estimated 67,000 tons annually westbound and 26,500 tons annually eastbound. (Ex. 4A, Item 10, pp.1-2). For each sailing by States every two weeks, Matson would have about 14 sailings per month; in a year's time Matson would carry 22 times as much cargo as States. Expressed in percentage, the Secretary noted that the cargo which would be moved by States in the California-Hawaii trade on the additional sailings would be 5% of the total cargo moving in that trade. The Secretary then concluded on the basis of these findings (which were derived from the numerous exhibits and findings of the Board, Hearing Examiner, and Review Examiner): "that Matson has not had substantial competition in the California-Hawaii trade, and that the competitive situation would be changed to some, but not to a great, extent by granting States' application." (S.C.D., p.43). The record clearly reflects that the Secretary's basic conclusion regarding the respective position of the two carriers at the time of the decision and in the future is supported by substantial evidence.[18]

The total impact of States' additional service in relation to Matson's position in the trade is a proper factor to be considered in determining whether unfair competition would result.[19] It is true that under the Secretary's new

18. In its brief Matson quibbles with many of the subsidiary findings listed in the Secretary's decision (Matson Reply Memo pp. 40-41) although admittedly there may be some legitimate disagreement over the actual statistics, the ultimate conclusion that the competitive situation would not be greatly altered is clearly supportable by the record.

19. The Federal Maritime Board had indicated in previous 805(a) cases that carriage by the applicant subsidized operator of only a small percentage of the total cargo movement in the domes-

test a near monopolist such as Matson is not entitled in all circumstances to as much protection from entry of subsidized operators into its waters as a small unsubsidized carrier in a tightly competitive market would have against the same subsidized operator. A slight subsidy benefit in the former case may serve the over all purpose of the Act while barely causing more than a ripple of competitive disadvantage; whereas in the latter case it could disturb the entire ebb and flow of a given market. Nevertheless, this quantitative or relational approach would not always be determinative of the unfair competition issue. For example, if States were permitted to enter the California-Hawaii trade and to use diverted subsidy or residual subsidy to "skim the cream" of the domestic cargo in that trade, unfair competition might result even though a very small percentage of the total cargo were involved. On the other hand even if the amount of additional cargo carried by States in the California-Hawaii trade were held to be substantial that would not be equivalent to a determination that States would have a substantial competitive advantage over Matson *because of residual subsidy.*

The critical question then in resolving the unfair competition issue is not how much cargo States will carry in relation to Matson, but how much cargo it will take away from Matson as a result of its residual subsidy benefit and the eventual impact of this loss upon Matson. The Secretary fully considered the various dollar figures of projected residual subsidy which were submitted to him. He accepted the Hearing Examiners basic finding that States California-Hawaii service would be unprofitable on a full absorption basis (S.C.D. p.52). Matson is correct that the Secretary did

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tic trade is not substantial competition to an exclusively domestic operator therein. States Marine Lines, Inc. Sec. 805(a) Application, 6 F.M.B. 378, 384 (1961), Pacific Transp. Lines, Inc. Sec. 805(a) Application, 4 F.M.B. 146, 148 (1953).

not come to an exact dollar figure of residual subsidy benefit, and that he at times considered all 26 voyages and at other times only the additional 13.[20] Neither of these points however cast doubt on the validity of the Secretary's ultimate conclusion that the residual subsidy benefit would not give States a substantial competitive advantage. The Secretary had before him a wide range of figures which varied according to the method of accounting, the designation of items as fixed costs or doing business and the technique of cost allocation. Faced with a number of acceptable accounting methods he was free to choose the figure which he considered most accurate as long as it was a reasonable figure which accorded with modern accounting practice. Congress did not dictate a single type of accounting technique with elaborate regulations as guidelines to the untangling of complex tax and subsidy allocations. The Court would have accepted any of the figures based on full absorption accounting. However, even if the Court had felt that the $1,200,000 annual figure offered by Matson was the only accurate portrayal of the subsidy residue, the Secretary's conclusion as to unfair competition would still be

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20. The Hearing Examiner ruled and the Board and Secretary affirmed the proposition that the Secretary would only consider the additional 13 voyages for which States sought permission. The Secretary's primary duty was to consider the fairness of competition and the prejudice which might result from the 13 additional sailings. However, the Secretary did not ignore the reality that States already was making 13 calls pursuant to an earlier application. In determining the extent of competition which States would offer, the Secretary did consider the cumulative impact and the incremental effect. (S.C.D. pp. 42-43, 59). There were many other instances throughout the Order in which the Secretary weighed the cumulative effect of the 26 voyages. (S.C.D. pp. 33, 48, 49, 50, 51, 64, 75-77). Accordingly Matson's attempt at handing the spectre of *Brown Shoe Co. v. U.S.*, 370 U.S. 294 over States is futile. The Secretary under the new standard announced in this case—substantial competitive advantage—will necessarily review the over all competitive picture any time that an application for additional authority is submitted.

rational and supported by substantial evidence. For the Secretary pointed out that despite States subsidy crutch certain equalizing forces would operate to abate that advantage considerably. First, he alluded to the normal Statutory and contractual restriction upon the subsidized contractor and, government aid in various forms and in substantial measure to domestic operators. (S.C.D. p.53) Next he noted that the outlook for the California-Hawaii trade is one of growth — and that even by Matson's standards it is expected to continue to grow at a rate of from 1% to 2% each year. Using this projected growth figure coupled with other findings concerning Matson's predominance in the trade as compared with States, the Secretary concluded that Matson would probably within 5 years be carrying as much cargo as it did at the time of States application for 13 additional sailings.

In addition to the above findings which were clearly supportable, the Secretary, within the proper bounds of his discretion, predicted that effective competition would be increased modestly in the trade as a result of granting the application. (S.C.D. p.53) He regarded this prospect as beneficial to the maritime trade and echoed the words of the Court in *PFEL* that "effective competition is not to be equated with unfair competition." To support this finding that effective rather than unfair competition would ensue, the Secretary had before him the conclusions of the Hearing Examiner Board and Review Examiner that States would not compete "fraudulently, in a cutthroat manner, or in a way that is unfair according to accepted generally applicable legal or ethical standards." (S.C.D. p.39) He had good reason, and ample testimony to believe that States would continue to adhere to the dominant carrier principle of following Matson's rates. (Transcript 319, 692-94). Further-

more, the Secretary found that, although States would offer available service for some high profit cargo, there was no basis to conclude that States would (in its increased California-Hawaii service) engage in an extensive "cream-skimming" operation to Matson's detriment. (S.C.D. pp. 60-62). Rather, States would in many cases provide welcome additional service and available sailing dates for West Coast shippers.

As an added protection and because the consequences of granting the application could not be determined with any degree of certainty, the Secretary provided in his order for an approriate and expeditious review of all 26 States voyages at the end of a three year period. In the meantime the Secretary's conclusion must stand as it is amply supported by substantial evidence.

The Court also upholds without hesitation the Secretary's finding under Section 805(a) that the granting of the application would not do prejudice to the objects and policies of the Act. The wording of this requirement by its very nature confers the widest range of discretion upon the Secretary. Furthermore, although Matson has raised some serious questions concerning the Secretary's adoption of a new standard and his application of that standard to the unfair competition issue, its attempt to overturn the Secretary's conclusion on this issue is basically a last ditch attempt to revert to the obsolete doctrine of fundamental entitlement.

The thrust of the Secretary's conclusion is simply that the California-Hawaii trade will grow enough to accommodate both Matson as the predominant carrier and States the supplemental carrier. He found no reason to accept Matson's dour prediction that a direct repercussion of States additional service would be an increase of rates and curtailment of service by Matson. The evidence pointed to the greater likelihood of a decrease in rates. He had previ-

ously rejected the accusation that States would confine itself to "cream skimming" operations.[21] He further concluded that he could deal with any ensuing inadequacy in States Far East service if that situation should appear. In aggregate, the protesting carrier Matson was resorting to raising every possible detrimental effect which *might* follow a grant of 13 additional calls to States. The Secretary had substantial evidence to reach contrary conclusions. However, if the future developments in the trade proved him incorrect, the Secretary added the built-in provision for expeditious review within a three year period of all 26 voyages.

On the other hand, the Secretary foresaw considerable benefits to the objects and policies of the Act as a result of States additional entry into the domestic trade. Although it is true that Matson's carrier service is on the whole adequate to meet the needs of most Hawaiian shippers, it is undisputed that there exists a definite need for better service westbound in some types of cargo[22] (e.g. auto dealers, household goods, fruit products, Transcript 878, 1119,

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21. The Secretary found that it would be "reasonable to expect that with more frequent sailings shippers of general cargo would increasingly ship with States, and that its cargo mix would have a lower proportion than it now has of the enumerated high net revenue, more easily handled items." (S.C.D. p. 61). States as a common carrier would be obliged to accept any cargo offered to it. Thus with time States would be picking up the slack in service with a mixed cargo rather than "skimming the cream."

22. The Hearing Examiner noted that shippers of used automobiles had on occasion been unable to get space on Matson's vessels when they wanted it, although Matson had done much to alleviate that situation. (S.C.D. p. 64). The Board also referred to the unusually high utilization of Matson's capacity and complaints indicating that Matson's services do not fully meet the needs of many shippers. These findings all accord with the Secretary's determination that Matson ran a "tight service" and in view of the predicted growth in the trade, the public interest in general and westcoast shippers in particular would be greatly benefited by States additional service.

3568). Additionally the intervenor defendant, Port of San Diego, testified that San Diego badly needed service to Hawaii which Matson did not provide. Both the Board and the Secretary found that permitting States to engage additionally in the California-Hawaii trade would not only furnish needed service to San Diego but would aid in meeting national defense requirements in facilitating the movements of military cargo from an important military base to outlying defense areas in the mid-Pacific and the Far East. (S.C.D. p. 67)

There is no doubt that Matson may suffer some temporary financial loss as a result of States additional service in the California-Hawaii trade. But throughout the Secretary's order is the firm belief supported by evidence that temporary setbacks can be rectified by growth in the trade and more effective service. In the meantime a healthy dose of competition would be injected into the trade and the public interest will be better served. The unhealthy dependence of some shippers on Matson would be reduced. States additional service would remedy the tightness of Matson's closely run service and provide more adequate service to west coast shippers. If the increased competition results in a lowering of rates the public, including Hawaii, will benefit to a considerable degree. If the predicted growth in trade does materialize facilities will be available to accommodate the needs of increased cargo demands. The over all loosening of a near monopolist's grip on the State of Hawaii is fully in accord with the antitrust policy of this country. In weighing prejudice to the objects and policies of the Act, the Secretary was fully cognizant that what may be bad for Matson is not necessarily bad for the country and its merchant marine. *Pacific Far East Lines, Inc. v. Federal Maritime Board, supra,* p. 186.

There is no cause for unsubsidized shippers to panic in fear of a sudden intrusion into their trade areas by subsidized operators. The Secretary was dealing with a specific situation in which possible benefits to the trade greatly outweighed the potential harm of a limited amount of subsidy residue. Unsubsidized operators will still receive substantial protection from Section 805(a). Permission to enter the domestic trade by a mixed service operator will only be granted as a final resort when adequate service by unsubsidized operators is unavailable. Therefore, it is the opinion of this Court that the dual purpose of the Merchant Marine Act to develop and protect both the foreign and domestic water-borne commerce is not only kept intact but is actually promoted by the Secretary's decision in this case.

In accordance with the above,[23] Matson's motion for summary judgment is DENIED, the cross motion for summary judgment by the intervenor defendants is GRANTED, and the Secretary's Order granting the application of States is hereby AFFIRMED.

Dated: August 10, 1966

ALBERT C. WOLLENBERG
United States District Judge

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23. The Secretary was free to discard administrative precedents as long as he fully explained the basis of his decision. The Secretary's Opinion can only be praised for its clarity, documentation and thoroughness. Since the Court believes that the Secretary's findings and analysis are more than adequate to support his decision, it is not necessary to discuss the other procedural objections offered by Matson.

Appendix C

DEPARTMENT OF COMMERCE
Office of the Secretary

MARITIME SUBSIDY BOARD DOCKET S-121

STATES STEAMSHIP COMPANY —
APPLICATION TO CALL AT HAWAII

OPINION AND ORDER OF THE SECRETARY OF COMMERCE

I

This proceeding is before the Secretary of Commerce in accordance with Department of Commerce Order No. 117 (Revised) for review of a decision by the Maritime Subsidy Board granting an application of the States Steamship Company for permission to increase its intermediate calls at Hawaii in connection with its California/Far East service.

In January, 1961, States Steamship Company (States) filed with the Federal Maritime Board[1] an application for permission under section 805(a) of the Merchant Marine Act, 1936, (Act) as amended, to increase its intermediate service between California and Hawaii from 13 to 26 calls per year in each direction on the sailings of its subsidized ships on Trade Route 29, between California and the Far East.

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1. By authority of Reorganization Plan No. 7 of 1961, effective August 12, 1961, the Maritime Subsidy Board succeeded the Federal Maritime Board as to jurisdiction over the States Application herein.

The Harbor Commission of the City of San Diego[2] intervened in behalf of the applicant; Matson Navigation Company (Matson) and the State of Hawaii (Hawaii) intervened in opposition. Public counsel of the Maritime Administration also took a position in opposition to the application.

In March, 1963, the Hearing Examiner served his Recommended Decision, concluding that to grant States' application under 805(a) would result in unfair competition to Matson and be prejudicial to the objects and policy of the Act, except that States should be permitted (a) to serve San Diego, California, 26 times a year in each direction, and (b) to lift cargo in California for discharge in Hawaii (but not cargo in Hawaii for discharge in California) to the extent of 26 calls a year, whenever Matson, upon two weeks prior request therefor, informs the shipper within 24 hours after such request that it is unable to transport cargo offered to it for specific sailings.

All parties, including Public Counsel, filed exceptions to the Recommended Decision. The Maritime Subsidy Board took the decision under review, and in a Final Opinion and Order, decided October 7, 1963, and served November 27, 1963, the Board rejected the Recommended Decision and granted the requested permission. The Board's decision was based on conclusions that a subsidized operator is not excused by sections 506 and 605(a) of the Act from obtaining section 805(a) written permission; that Matson operates exclusively in the coastwise or intercoastal service within the meaning of 805(a); and that granting the pro-

2. Subsequent to this intervention, the Harbor Commission of the Port of San Diego was replaced by the Port of San Diego Unified Port District. The latter, rather than the former, public agency is now a party to this proceeding and is referred to hereinafter as "San Diego".

posed service would not, under the terms of 805(a), result in unfair competition to any domestic operator nor be prejudicial to the objects and policy of the Act.

Petitions for review, from Matson and Hawaii, and replies from States and San Diego asking that review not be granted were filed with the Secretary of Commerce, who, on January 6, 1964, decided to stay the Board's action and to review the Board's Opinion and Order. On April 23, 1964, the Secretary, in an Opinion and Order holding that section 805(a) is applicable in this case so that States must obtain written permission to increase its calls at Hawaii as proposed, reversed the Board, finding that to grant the application would, under the terms of 805(a), be prejudicial to the objects and policy of the Act. The Secretary, however, authorized States to carry cargo from California to Hawaii up to 26 voyages a year on condition that the right of refusal upon two weeks notice be given to the unsubsidized operators in the trade.

In June, 1964, States filed in the U. S. District Court for the District of Columbia a civil action requesting the Court to review and set aside the Secretary's Opinion and Order. The Secretary, and intervenors Matson, Hawaii, and San Diego, filed answers to the complaint. All parties filed motions for summary judgment.

In December, 1964, the Secretary filed with the Court a motion for remand of the proceeding, so that he could set aside his April 23, 1964, decision and set up a procedure for further review of the case, including the designation of a Review Examiner to assist in the review and to report recommendations to the Secretary, following which a final administrative disposition of the case would be made. A stipulation by all parties in the case, concurring in the motion to remand, was filed with the Court. The Court entered an order for remand and in January 1965, the Sec-

retary by order set aside his earlier decision and set the matter for further Secretarial review.

The Secretary by letter of January 14, 1965, appointed a Review Examiner, gave him a set of instructions, and requested that he submit his recommendations to the Secretary of Commerce within 60 days. On March 1, 1965, the Review Examiner served his Recommended Decision. The Review Examiner concluded that written permission under section 805(a) is *not* required where a subsidized operator in foreign trade wishes to make intermediate calls at Hawaii on subsidized voyages, because sections 605(a) and 506 grant express permission for such mixed voyages and provide protection for exclusively domestic carriers through pro-rata reduction and refund of subsidy for the domestic portion of the mixed voyage. However, he also concluded that, even if 805(a) applies so as to require written permission, the proposed increased calls by States would not result in unfair competition or be prejudicial to the objects and policy of the Act. His recommendation was to remand the proceeding to the Board with directions that it enter an order to revise States' subsidy contracts so as to eliminate any limits on the trading areas based on 805(a).

Exceptions to the Review Examiner's recommended decision, and briefs in support of such exceptions, were filed with the Secretary by Matson and Hawaii. Also, a brief was filed in behalf of American Union Transport, Inc., (AUT) and Isthmian Lines, Inc., (Isthmian) as *amici curiae,* addressed to the question whether, as a matter of law, the section 805(a) written permission requirement applies to subsidized vessels operating in the domestic trade pursuant to sections 506 and 605(a) of the Act. These amici parties took the position that the 805(a) written permission requirement is applicable. States filed a reply brief, and San

Diego filed a letter of reply, to the foregoing exceptions and briefs. On April 29, 1965, oral argument in behalf of Matson, Hawaii, AUT-Isthmian, States, and San Diego was held before the Secretary.

The case is now before the Secretary of Commerce for decision, against a background of four previous decisions at various administrative levels, two of which approved States' application and two of which denied the application.

The issues to be decided are:

a. Does section 805(a) of the Act require States to obtain written permission in order to engage, as proposed, in the domestic trade and, at the same time, receive operating-differential subsidy?

b. If the answer to the above issue is "yes," does Matson operate exclusively in the domestic service so as to be entitled to protection under 805(a) against the grant of an application that would result in unfair competition to such an operator?

c. If the answers to the above issues are "yes," would approval of States' application result in unfair competition to Matson, within the meaning of section 805(a)?

d. If the answer to the issue stated first above is "yes," would approval of States' application be prejudicial to the objects and policy of the Act within the meaning of section 805(a)?

II

THE APPLICABILITY OF SECTION 805(a)

States contends that section 805(a) permission is not required in this case. The Board disagreed, but the Review Examiner agreed, with this contention. The basis asserted for the contention that section 805(a) permission is not required is that sections 506 and 605(a) in effect authorize subsidized service in certain mixed foreign and domestic

voyages specified in those sections, including a voyage in a foreign trade in which the vessel stops at Hawaii, and by statutory construction, therefore, section 805(a) cannot apply.

For the reasons hereafter stated, I conclude that States is required by section 805(a) to obtain written permission in order to increase its domestic calls at Hawaii and at the same time continue to receive operating differential subsidy.

(a) Express language of the statute.

The relevant portion of 805(a) reads as follows:

> "It shall be unlawful to . . . pay any subsidy to any contractor under authority of title VI of this Act . . . if said contractor . . . directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service . . . without the written permission of the Commission [now Secretary of Commerce]. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the [Secretary] shall give a hearing. . . . The [Secretary] shall not grant any such application if [he] finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act. . . ."

It seems quite clear that the express, mandatory, and all-inclusive terms of 805(a) provide that the Secretary may not, without exception, pay *any* operating differential subsidy (ODS) to any contractor who operates any vessel engaged in domestic intercoastal or coastwise service *without written permission.*

Accepted rules of statutory construction call for the conclusion that the requirements of 805(a) do apply to the States' application. The plain meaning of a statute must

be adopted;[1] its clear meaning is not to be departed from.[2] It is unnecessary to look beyond clear and unambiguous statutory language; a statute means what it plainly expresses.[3] When a statute's language is clear, resort need not be made to legislative history.

> "There is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco v. Walling, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions [citing cases]."[4]

The argument is made, however, that these aforementioned rules of statutory construction do not apply to 805(a) on the facts of this case because to apply 805(a) literally here would bring it into conflict with other sections of the Act of which it is a part, contrary to the rule of statutory construction that various sections of an act are to be construed so as to give harmony to the whole. In this connection, the Review Examiner pointed to what he conceived to be several inconsistencies in or between 805(a), 506 and 605(a) if these sections are construed to cover the same vessels and services. This in turn led him to seek an interpretation of 805(a) that would be, in his view, consistent

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1. Jay v. Boyd, 351 U.S. 345, 357 (1956).

2. United States v. Sullivan, 332 U.S. 689, 693 (1948). See also Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

3. Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 64 (1953); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944); Helvering v. Hammel, 311 U.S. 504, 511 (1941); Hilliard v. United States, 310 F. 2d 631, 632 (6th Cir. 1962); American Community Builders, Inc. v. Com'r. of Internal Revenue, 301 F. 2d 7.13 (7th Cir. 1962).

4. Ex Parte Collett, 337 U.S. 55,61 (1949).

with 506 and 605(a). His solution was to conclude in this case, as urged by States, that section 805(a) does not apply to subsidized vessels proposed for operation in certain domestic trades (in this case, the California/Hawaii trade) by means of intermediate calls on voyages in the foreign trade, but that 805(a) applies only to the separate domestic operation of *unsubsidized* vessels owned or controlled by an operator who also has at the same time *other* vessels which are subsidized in the U. S. foreign trade. Further, the Review Examiner concluded that sections 506 and 605(a) only are applicable to the proposed use of *subsidized* vessels in the "domestic" trade, and that the proration formulae of these two sections are in effect self-operative and do not depend on a prior 805(a) written permission.

I have given careful consideration to what the Review Examiner has described as "patent inconsistencies" in these sections of the statute and am not persuaded that his analysis is correct. Section 805(a) states that it is unlawful to pay subsidy to any contractor who operates "any" vessel in the domestic intercoastal or coastwise trade, "without written permission" of the Commission (now Secretary of Commerce). I interpret section 805(a) to mean what it says, that is, a subsidized operator should get written permission to operate *any* vessel, subsidized or unsubsidized, in the domestic trade — otherwise, he may not continue to receive subsidy payments. Then, if 805(a) written permission is given as to *subsidized* vessels, the proration formulae of sections 506 and 605(a) obviously are to be applied. Of course, 805(a) permission can only be given as to subsidized vessels where the proposed calls would not be precluded by the terms of 506 and 605(a). On the other hand, if unsubsidized vessels only are covered by a given 805(a) written permission, the proration formulae of sections 506 and 605(a) are, of course, not relevant.

(b) Legislative history.

Because of conflicts between sections of the Act that he thought would result if 805(a) is interpreted to apply to subsidized vessels operated in a mixed service by a subsidized carrier the Review Examiner resorted to legislative history. As stated above, I do not see such ambiguity on the face of the statute as to call for resort to legislative history, and therefore conclude on the basis of authority previously cited that it is not necessary to look further than the clear, express language of the statute. Nevertheless, I have examined the pertinent legislative history to see if it supports the interpretation of section 805(a) which is urged by States and recommended by the Review Examiner.

It is true, as the Review Examiner points out, that in the Congressional committee hearings domestic operators voiced concern about subsidized carriers operating vessels in the domestic trade. But they were concerned both with subsidized and unsubsidized vessels and voyages in such trade on the part of operators receiving subsidy. It is also true that sections 506 and 605(a) have to do with subsidized vessels. But it does not at all follow that Congress must therefore have intended 805(a) to apply only to unsubsidized vessels of operators receiving subsidy. The Review Examiner in effect reasons that Congress, seeing a threat to the unsubsidized carrier from operators receiving subsidy, compartmentalized the Act so as to provide in 506 and 605(a) for the case of subsidized operators competing by the use of subsidized vessels, and in 805(a) for the case of subsidized operators competing by the use of unsubsidized vessels. He thus refers to the respective sections as having a dichotomy of purposes, 506 and 605(a) on the one hand and 805(a) on the other providing a "separate solution" for a "separate problem."

My own review of the legislative history does not lead me to conclude that such a dichotomy of purposes resulted in Congress enacting 805(a) as a means of getting at only the "problem" of a subsidized carrier operating unsubsidized vessels in a domestic trade. The only basis in legislative history that I find for a conclusion that anyone at the time the legislation was being proposed construed the 805(a) provision as intended to be so restrictive lies in an exchange, during Senate Committee hearings in 1936 on S. 3500, between a Mr. J. S. Peacock, Director of the Shipping Board Bureau, and Senator Bachman.[1]

This exchange is ambiguous. It could mean, as States and the Review Examiner say, that Mr. Peacock construed the permission requirement as being applicable only to subsidized operators who wish to operate a separate, unsubsidized intercoastal service. (If so, the exchange indicates that the Senator did not so construe it.)[2] On the other hand,

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1. "Senator Bachman. Colonel, what is the reason for any subsidy for a strictly coastwise trade? It does not come into competition with foreign trade.

"Mr. Peacock. There is no reason other than the possible building of ships, and this bill does not provide any subsidy for strictly coastwise trade.

"Senator Bachman. But the Authority is given permission to grant it.

"Mr. Peacock. No. The permission here, if I recall rightly simply refers to permitting a subsidized foreign operator also to operate separately and independently in intercoastal service, not a subsidized intercoastal service.

"Senator Bachman. I did not so construe it." (Senate Hearings on S. 3500, 74th Cong., 2d Sess., page 88 (March 1936)).

2. The only other reference cited that may support the view of States and the Review Examiner in this respect, that at the time the 1936 Act was enacted 805(a) was regarded as applying only to unsubsidized vessels operated by subsidized carriers in a domestic trade, is to the book, Nicolson, *The Maritime Subsidies* (1937), excerpts from which appear in States' "Study of the Legislative History" an appendix to its opening brief before the Hearing Examiner. Mr. Nicolson's views, while of interest, are not, of course, a part of the Act's legislative history.

Mr. Peacock's statement could be interpreted, as Matson interprets it, as not addressed to the question of authority to grant permission as to a mixed foreign and domestic trade, but as stating the conclusion merely that subsidy could not, under 805(a) be granted "for a strictly coastwise trade" (because of the prohibition in 605(a)) but that permission could be granted only "to operate separately and independently in intercoastal service."

Interpreting 805(a), as well as 506 and 605(a), as applying to subsidized vessels of a subsidized carrier on a mixed domestic and foreign voyage, does not mean that Congress unnecessarily wrote 805(a) to take care of a situation for which it had already provided in the other sections. Sections 506 and 605(a) generally prohibit the payment of subsidy as to vessels on a voyage on which they engage in domestic trade, except that subsidy is permitted as to voyages in the mixed foreign and domestic trades specified therein upon payback and reduction of subsidy according to the formulae provided therein. This of course provides a significant amount of protection to unsubsidized domestic operators. However, early drafts of the 1936 Act containing 506/605(a) type provisions resulted in protests by domestic operators on the ground of probable unfair advantages a subsidized operator would have in the mixed trades despite such protection. In subsequent versions of the Act, as an additional protection to unsubsidized domestic operators with regard to operation of subsidized vessels in mixed voyages, it was first provided that subsidy would be reduced while such a vessel was being operated with the "consent" of the agency, and in a later forerunner to 605(a) that subsidy would not be paid as to such a vessel without express permission having been given the agency after application and hearings.

It is true that the permission requirement was moved from 605(a) to 805(a) before passage of the Act, but legislative history does not indicate any change in Congress' purpose to provide both kinds of safeguards for the unsubsidized domestic operator with regard to subsidized carriers operating subsidized vessels in the mixed trades. Read as a whole, the Act retained both kinds of protections, and it may be assumed that Congress felt it unnecessary to state the basic permission requirement more than once in the Act, *i.e.*, in 805(a).

I agree with the Maritime Subsidy Board that Congress must have intended for 805(a) to provide controls with regard to mixed 506/605(a) voyages by subsidized operators for the protection of domestic operators in addition to the subsidy repayment and abatement provisions of 506 and 605(a). My review of legislative history does not lead me to any other conclusion than that 805(a) was intended to be applicable to a factual situation such as presented by this case.

To agree with the Review Examiner on the other hand would require, to use the words of the Supreme Court, "strained processes of deduction from events of wholly ambiguous significance" furnishing "dubious bases for inference in every direction."[1]

(c) "Pragmatic considerations."

The Review Examiner in arriving at his construction of 805(a) also applied what he termed "pragmatic considerations that can be deemed to have influenced Congress." As precedents for using this procedure as a means of statutory construction, he cited *United States v. American Trucking Association,* 310 U.S. 534, 543 (1940); and *United States*

1. Ex Parte Collett, 337 U.S. 55, 61 (1949), quoting Gemsco v. Walling, 324 U.S. 244,260 (1945).

v. National Marine Engineers' Beneficial Association, 294 F. 2d 385 (2d Cir. 1961). These cases hold that, while there is no more persuasive evidence of a statute's purpose than its words and while the plain meaning of those words is normally followed, such plain meaning is not followed when to do so would lead to absurd or futile results or to unreasonable results plainly at variance with the policy of the legislation as a whole.

The over-all policy of the Merchant Marine Act of 1936, set forth in sections 101 and 210 of the Act, is to foster the development and encourage the maintenance of an adequate and well-balanced merchant marine sufficient to carry the water-borne domestic commerce and a substantial portion of the water-borne foreign commerce of the United States.

Following the plain meaning of the express wording of 805(a) as it is noted above, has not led, nor in my view will lead, to "absurd" results or to "futile" results or to "unreasonable results plainly at variance" with the policy of the Act. To the contrary, the express wording of section 805(a) gives effect to the Congressional purpose of promoting an adequate and well-balanced American merchant marine, for both foreign and domestic commerce. That part of the merchant marine that is subsidized in foreign commerce under the Act is assisted by the subsidy in meeting the competition of lower-cost foreign operators. At the same time, procedures are established in 605(a) and 506 and in 805(a) to assure that such subsidy is not used unfairly against that part of the merchant marine engaged exclusively in domestic trade, which, because foreign flag operators are excluded from the domestic trade, receive no subsidy.

Thus section 605(a) generally prohibits payment of ODS on a vessel on a voyage in which it engages in domestic trade; and, while specifying that such subsidy "may be

paid" on voyages in four enumerated mixed foreign and domestic trades, it requires subsidy reduction on such voyages according to a stated formula. And section 506 provides as to a vessel on which construction subsidy has been paid, for subsidy repayment according to a stated formula when that vessel is used in one of the enumerated mixed trades.

Since the Secretary is authorized to pay subsidy to vessels on voyages in certain mixed trades, this indicates a Congressional attitude that it may be in the public interest for subsidized carriers, under certain conditions, to operate in the domestic segments of such trades. The application of section 805(a) to proposals of subsidized carriers to serve these mixed trades with subsidized vessels gives an added protection to the unsubsidized carriers operating in the domestic segments of such mixed trades. Thereby, Congress has forbidden the Secretary to pay ODS to a carrier operating in the domestic trade without the Secretary's written permission, has provided for a hearing on applications therefor with intervention by interested persons, and has prohibited grant of such an application if the Secretary finds it would result in unfair competition to exclusively domestic operators or would be prejudicial to the objects and policy of the Act.

Thus the Congress in an effort to achieve an adequate, well-balanced American merchant marine through the subsidy program of the Act sought both to promote the foreign commerce segment and also to encourage the maintenance of the domestic commerce segment of the merchant marine.

The application of this interpretation of 805(a) does not, of course, result automatically in prohibiting subsidized vessels from serving domestic segments of mixed voyages specified in 605(a). States and other subsidized carriers have in the past been permitted to furnish such service.

Adopting the interpretation of 805(a) recommended by the Review Examiner—that the 805(a) requirements apply to an ODS contractor's unsubsidized, but not subsidized, vessels in a domestic service—would lead to results that I believe would indeed be "unreasonable" and "plainly at variance" with the policy of the Act. I mention only two examples at this point. Applying this interpretation, unsubsidized carriers in a domestic trade would receive *less* protection from *subsidized* vessels of ODS contractors than from unsubsidized vessels of ODS contractors operating in that trade, because 805(a) would require written permission only as to unsubsidized vessels. Also under this interpretation the Secretary, while retaining significant controls (e.g., maximum and minimum sailings and ports of call) over subsidized carriers' foreign operations, would lose a significant kind of control that he has been thought to have and that he has been exercising over such carriers' domestic operations with subsidized vessels. This in turn could well result in a concentration by such carriers of subsidized vessels in the domestic portion of a mixed trade and comparatively less attention to the foreign trade in which the carrier is subsidized to compete, thereby thwarting the efforts of the Secretary to promote, through administration of the subsidy program of the Act, the Nation's foreign commerce by ocean transportation.

(d) Administrative construction.

The long-standing administrative interpretation of the 1936 Act by the Maritime Administration and its predecessors, supporting the express language of 805(a), has been that written permission under that section is required in order for a subsidized carrier to operate any voyage in a domestic service, including the mixed foreign and domestic trades specified in 506 and 605(a) and, at the same

time, receive ODS.[1] The Review Examiner recognized that "Predecessors of the Board required that permission be obtained under section 805(a) in circumstances such as those involved in this case."

In 1955 a formal rule-making proceeding was instituted by the Maritime Administrator/Board to review that interpretation of 805(a).[2] On the basis thereof, and after considering comments filed (including a brief submitted by States which supported the proposition that 805(a) applied to mixed voyages enumerated in 605(a)), the Administrator/Board concluded that written permission under 805(a) was required for the mixed voyages specified in 605(a).[3]

And, of course, not only the Subsidy Board's predecessors but the Board itself has followed this interpretation of 805(a) applicability in the instant case and in others.[4]

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1. Examples: Lykes Bros. Steamship Co., Inc., Docket S-9, 3 U.S.M.C. 349 (1947); American President Lines, Inc., Docket S-25, 3 F.M.B. 553 (1951); Pacific Transport Lines, Inc., Docket S-18, 4 F.M.B. 7 (1952); Pacific Transport Lines, Inc., Docket S-18 (Sub. No. 1), 4 F.M.B. 146 (1953); American President Lines, Inc., Docket S-17 (Sub. No. 1) and S-33, 4 F.M.B.-MA 488 (1954); States Steamship Co., Docket S-128, 1 SRR (Pike & Fischer) 599 (MSB 1961).

2. The published notice of rule-making stated that it concerned whether written permission was required under 805(a) for "the activities and relationships described therein [in 805(a)] related to voyages described in Section 605(a) of said Act." 20 Fed. Reg. 8050 (1955), American President Lines, Ltd.—Proposed Rule Making, Docket S-59.

3. Maritime Commission Minutes, November 17, 1959, page 56015.

4. States Steamship Co.—Hawaiian Outbound Calls, Docket S-128, 1 SRR (Pike & Fischer) 599 (MSB 1961); Grace Line, Inc., American Export Line, Inc., U.S. Atlantic-Puerto Rico Service, Dockets S-140 and S-141, 2 SRR (Pike & Fischer) 1101 (1963). States and its predecessor in interest in the Hawaiian domestic trade, Pacific Transport Lines, both before and after the 1955 rule-making proceeding, filed and received 805(a) permission in this trade. States Steamship Co.—Hawaii Outbound Calls, *supra;* Pacific Transport Lines, Inc., Section 805(a) Application, 4 F.M.B. 146 (1953).

This long-standing administrative interpretation of 805(a) is entitled to great weight in any event. And this would be so even if the meaning of 805(a) were not clear, under the rule of statutory construction that where a contemporaneous and practical interpretation by those administering a statute stands for a considerable length of time that interpretation is to be accorded great weight in ascertaining the meaning of doubtful statutory language.[1]

It is also impressive in this connection that, in the face of the well-known, long-standing administrative interpretation of 805(a) described above, Congress has not changed the 805(a) provisions here in question although, in the course of amending the Act more than a hundred times over the years, Congress has reviewed extensively the subsidy program a number of times.[2] It is clear that Congress has accepted the administrative construction as the correct one. A contemporaneous, long-standing, consistent interpretation of a statute is entitled to even more weight where the statute in question has repeatedly been before Congress, and especially where Congress has re-enacted or amended

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1. Great Northern R. Co. v. United States, 315 U.S. 262 (1942); Johnson v. Britton, 290 F. 2d 355 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 859 (1961); Savoid v. District of Columbia, 288 F. 2d 851 (D.C. Cir. 1961). Contemporaneous interpretations of such periods of time as 5, 9, 10, 18, and 20 years have been taken as governing statutory meaning. Sutherland, *Statutes and Statutory Construction* (3d ed. 1943) § 5107.

2. See, *e.g.*, Hearings before the Subcommittee on Maritime Affairs of the House Committee on Merchant Marine and Fisheries, Amending the Merchant Marine Act, 1936, 81st Cong., 1st Sess. (1949); Proposed Amendments to the 1936 Merchant Marine Act, 83d. Cong., 1st Sess. (1953); Study of the Operations of the Maritime Administration and the Federal Maritime Board, 84th Cong., 1st Sess. (1955); Current Merchant Marine Problems, 85th Cong., 1st Sess. (1957).

it without making changes that would nullify such interpretation.[1]

(e) Contractual Application.

Every operator receiving ODS, including States, is a party to an ODS contract with the United States, which contract provides in part that the contractor must obtain 805(a) permission in order to operate any vessel in the coastwise or intercoastal service.[2] I take notice of the fact that similar restrictive provisions have been a part of ODS contracts since 1937. This provision reflects a long-standing procedure of the Maritime Administration and its predeces-

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1. National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361 (1951); United States v. Stowe-Woodward, Inc., 306 F. 2d 678 (1st Cir. 1962), *cert. denied*, 371 U.S. 949 (1963). See also, Power Reactor Development Co. v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO, 367 U.S. 396 (1961); Empire State Highway Transportation Association v. Federal Maritime Board, 291 F. 2d 336 (D.C. Cir. 1961).

2. "II-15. *Coastwise or Intercoastal Service.* Neither the Operator, nor any holding company, subsidiary, affiliate, or associate of the Operator, nor any officer, director, agent or executive thereof shall, without the permission of the United States granted pursuant to Section 805(a) of the Act, directly or indirectly, own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service; Provided that, if such permission is or has been granted none of the persons mentioned in this Article shall divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign trade operation, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; Provided, further, that where such permission is or has been granted pursuant to the Proviso clause of the first paragraph of Section 805(a) of the Act, in the event of substantial change in the character or extent of such operations over those conducted during 1935, the foregoing permission to continue such operations may be limited or terminated by the United States, after notice to the Operator and opportunity for hearing, with respect to any or all of the operations thus permitted."

Article II-15, Operating Differential Subsidy Contract Between States Steamship Company and the United States. (Control No. FMB-62)

sor agencies, has been agreed to by all ODS operators, including States, and is itself good evidence of a contemporaneous, practical, and well-established interpretation of 805(a) as applicable to proposals by subsidized operators to employ subsidized vessels, while continuing to receive ODS thereon, in a domestic service.

In addition to the provision common to all ODS contracts, referred to above, States' ODS contract with the United States further provides that "Service A, B, and C vessels calling in the Hawaiian Islands shall only load and/discharge cargo to and from ports in the Far East except pursuant to written permission granted under Sec. 805(a) of the Act...." Article I-2 (f)(4)(a).

Therefore, even if the Review Examiner's interpretation of 805(a) were accepted, States has committed itself by specific provisions of an existing contract to obtain written permission under 805(a) before operating in the domestic trade, and I do not think it follows as a matter of law, as suggested in States' Motion for Summary Judgment (p. 4) in the District Court proceeding that the contract provision as such is not enforceable.

III

MATSON AS AN EXCLUSIVELY DOMESTIC OPERATOR

Under section 805(a), an application may not be granted if it is found that "it will result in unfair competition to any person, firm, or corporation *operating exclusively in the coastwise or intercoastal service. . . .*" (Emphasis added). Matson intervened after States' application was filed, contending in part that to grant the application would result in unfair competition to it as a corporation operating exclusively in the domestic service. Before proceeding to the

question of whether granting States' application would result in unfair competition to Matson so as to require a denial of the application, a determination must be made as to whether Matson qualified for 805(a) protection against unfair competition as a carrier "operating exclusively in the coastwise or intercoastal service."[1]

States, San Diego, and Hawaii have taken the position that Matson is not a corporation so operating. Matson, and the Public Counsel of the Maritime Administration in the proceedings below, have taken the contrary position.

The answer to this issue depends on the significance of the facts that a subsidiary of Matson's is a subsidized operator in a mixed foreign and domestic service and that Matson itself carried on certain non-domestic operations until February 1961.

The Hearing Examiner found that Oceanic Steamship Company (Oceanic), a subsidized operator on Trade Route 27 (West Coast United States/Australia-New Zealand), is a wholly-owned subsidiary of Matson; the officers of the companies are the same; Matson is Oceanic's managing agent; Oceanic's financial statements are included in Matson's annual reports; Matson files a consolidated tax return for both Matson and Oceanic; Oceanic has not declared or paid dividends to Matson but is accumulating a surplus which could be paid to Matson and which is building up Oceanic's net worth; the name "Matson" is identified in all

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1. Since under 805(a) the Secretary may not grant an application if he finds either that it will result in unfair competition to a person operating exclusively in the domestic service "or that it would be prejudicial to the objects and policy of this Act," it may be noted that, even if it were concluded that Matson is not operating exclusively in the domestic service for the purposes of this case and therefore without standing to claim protection under 805(a) against unfair competition, the question of whether granting States application would be prejudicial to the objects and policy of the Act would remain.

advertising of Oceanic's services; and Oceanic vessels make intermediate calls at Hawaii for domestic cargo and passengers. The Hearing Examiner also found that Matson, at the time States' application was filed had been making calls at British Columbia in connection with Matson's Pacific Northwest/Hawaii service, which calls Matson ceased, for operational and financial reasons, within a month after the filing of States' application.

On the basis of Board precedents, the Hearing Examiner in effect held that the above facts did not prevent Matson from having the status of a corporation operating exclusively in the domestic service, but indicated that in the absence of such precedents he would have concluded to the contrary because of the Matson-Oceanic relationship. The Board held that "for the purposes of this proceeding" Matson is an exclusively domestic operator entitled to the hearing-procedure protection afforded by 805(a). Because of conclusions reached on other issues, the Review Examiner concluded that it was unnecessary to decide this particular question, although he observed that States' argument on it appeared to have considerable merit.

After consideration of the facts recited above, the decision of the Board on the point, and the arguments in the briefs of the parties, I have determined that the Board correctly concluded that Matson operates "exclusively in the coastwise or intercoastal service."

I reach this determination on the facts concerning Matson's operations as of the date of States' 805(a) application on February 2, 1961, including the fact that at that time Matson, in connection with its Pacific Northwest/Hawaii service, had been making calls at British Columbia. Matson's status for purposes of this proceeding with regard to the question at hand is not changed, in my judgment,

because at a later date in February, 1961, it ceased making the British Columbia calls, has not made any such calls since, and has stated that it does not expect to make such calls in the future. The Hearing Examiner found that Matson discontinued the British Columbia calls for "operational and financial reasons," and nothing in the record has come to my attention that would cause me to believe that Matson was motivated to discontinue those calls by a desire to place itself in a better position to claim as an intervener in this proceeding the status of an exclusively domestic operator. However, I concur in the following statement of principle by the Federal Maritime Board in an earlier decision and do not believe that the facts of this case warrant a departure therefrom: "Voyages prior to the filing of an application must be considered as the basis for determination of exclusively domestic status; otherwise an intervener could gain such status merely by announcing that in the future he would confine his operations to domestic ports. . . ."[1]

Does the fact of Matson's British Columbia calls prevent it from qualifying as a person "operating exclusively in the coastwise or domestic service"? The Federal Maritime Board in a previous decision concluded that, while these calls precluded a finding in that case that Matson operated exclusively in the domestic service so far as its Northwest/Hawaii service was concerned, "[i]n its service between California and Hawaii it clearly operates 'exclusively' in the domestic service."[2] That conclusion is consistent with the administrative interpretation that has uni-

1. Waterman Steamship Corporation—Application under section 805(a), 6 F.M.B. 115; 121-22 (1960).

2. Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, 5 F.M.B. 287, 297 (1957). This conclusion was not disturbed by subsequent judicial review. Pacific Far East Line, Inc. v. Federal Maritime Board, 275 F.2d 184 (D.C. Cir. 1960).

formly been given since 1951 that the 805(a) phrase "person . . . operating exclusively in the coastwise or intercoastal service" applies to protect "operators furnishing an intercoastal service that does not include foreign ports."[1] In the instant case, the Hearing Examiner found that "Matson's British Columbia calls were in connection with its Northwest service," whereas States' domestic operation on which it seeks permission to double the number of its voyages "is between *California* and Hawaii and does not involve service to or from the Pacific Northwest." Under the interpretation referred to above, Matson is not prevented by calling on a foreign port in another service from claiming status as a person operating exclusively in the domestic service for the purposes of this proceeding since in the domestic trade herein involved, the California/Hawaii trade, Matson's service does not include foreign ports. I adhere to this interpretation and so apply it here. It is a reasonable interpretation, providing protection for unsubsidized service, which I understand to be the over-all purpose of 805(a); it has been uniformly applied over a long period of time; and in the face of this known interpretation and application Congress has not changed the wording of 805(a) in this regard although it has reviewed the Act and has made many amendments as to other provisions over the years. This is good evidence that this interpretation is the correct one.[2]

Matson's standing as a "person . . . operating exclusively in the coastwise or intercoastal service" is further chal-

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1. American President Lines, Ltd.—Unsubsidized Operations, Route 17, 3 F.M.B.—M.A. 457, 470 (1951); American President Lines, Ltd.—Subsidy, Route 17, 4 F.M.B.—M.A. 488, 501 (1954); Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, 5 F.M.B. 448, 460 (1958).

2. See authorities cited *supra* in connection with the discussion of the long-standing administrative interpretation of the applicability of the 805(a) written permission requirement.

lenged on the basis of its intercorporate relationship with Oceanic, and Oceanic's operation in foreign commeree, the facts concerning which as found by the Hearing Examiner have been noted above. Matson's standing in this regard in previous proceedings was similarly challenged. The Maritime Subsidy Board in 1961 held that Oceanic's foreign operations were not to be imputed to Matson, although it was wholly-owned by Matson, and that the exclusivity of the domestic character of Matson's California/Hawaii service was not vitiated thereby.[1]

The facts concerning the Matson-Oceanic relationship and the operations of these two companies have not changed significantly since the Federal Maritime Board's 1961 decision, as I read the findings officially made in that proceeding and as made by the Hearing Examiner in the instant case. Regardless of Matson's ownership of Oceanic's stock, the two corporations are separate legal entities. Oceanic's incorporation in 1926 could not have been for the purpose, and nothing in the record has come to my attention that would lead me to conclude that its subsequent operation as a wholly-owned Matson subsidiary has had the effect, of subverting any provision of the 1936 Act. I do not feel justified, therefore, in "piercing the corporate veil" so as to disregard the legal status of these two corporations as separate persons.

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1. States Steamship Company — Application under Section 805(a) to make 14 Outbound Calls at the Hawaiian Islands in Calendar Year 1961, Docket No. S-128. 1 S.R.R. (Pike & Fischer) 599, 600b (1961), citing American President Lines—Unsubsidized Operation, Route 17, 3 F.M.B. 457 (1951). See also Pacific Far East Lines, Inc.—Sec. 805(a) Calls at Hawaii, 5 F.M.B. 287, 297 (1957), where the Federal Maritime Board, while noting facts of the Matson-Oceanic relationship and Oceanic's foreign commerce operations, also held in a previous decision as to Matson that "[i]n its service between California and Hawaii it clearly operates 'exclusively' in the domestic service." As noted previously herein, this conclusion was not disturbed in the judicial review of the *PFEL* case, *supra*, 275 F.2d 184 (D.C. Cir. 1960).

IV

UNFAIR COMPETITION

Under section 805(a) the Secretary is prohibited from granting an application for permission to operate vessels in the domestic trade while the applicant is receiving ODS if he finds that "it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service."

Matson, and Hawaii on the assumption that Matson qualifies as a corporation operating exclusively in the domestic service, contend that the record calls for a conclusion that granting States' application would under the terms of 805(a) result in unfair competition to Matson in the domestic service involved, requiring a denial of the application. The Hearing Examiner found that granting States' application would result in unfair competition to Matson, except that States should be permitted to serve San Diego 26 times yearly in each direction and to lift cargo in California for discharge in Hawaii to the extent of 26 calls a year when Matson on a first refusal basis declines to carry cargo offered to it for specific sailings.

States and San Diego contend that, assuming 805(a) to be applicable and Matson to be an exclusively domestic operator entitled to raise the question of unfair competition, sections 506 and 605(a) through their subsidy proration provisions eliminate Matson's claim of unfair competition as a matter of *law*. They contend further that as a matter of *fact* subsidy proration eliminates from States' domestic Hawaii service all elements of unfair competition. Applying its stated standards of unfair competition to the facts, the Board found that States' proposed increased sailings would not constitute unfair competition to Matson. And the Review Examiner concluded that, assuming the

805(a) tests are issues to be considered in this case, it could not be found "on this record" that Matson would suffer unfair competition by reason of the proposed additional calls by States.[1]

In my judgment 506 and 605(a) do not have the legal effect ascribed to them by States and San Diego. To adopt the theory that, although 805(a) is assumed to apply, 506 and 605(a) subsidy proration provisions as a matter of *law* eliminate unfair competition from subsidy, despite what the consequences may be as a matter of *fact* to the unsubsidized domestic operator, would imply an unawareness or a disregard on the part of Congress of the unfairness of situations even where substantial subsidy remaining after proration is used to significant advantage over an unsubsidized operator in a domestic trade. I am unwil-

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1. States views the recommended decision of the Review Examiner as also holding that, even if 805(a) were applicable, the subsidy proration provisions of 506 and 605(a) eliminate as a matter of *law* Matson's claim that States' subsidy gives States an unfair advantage over Matson in competing in the Hawaii/California domestic trade and is unfair competition under 805(a). It is not clear, however, that the Review Examiner reached such a conclusion as to the legal effect of 506 and 605(a). After noting States' contention as to the legal effect of 506 and 605(a), the Review Examiner stated that "It must be concluded that since Congress did not intend section 805(a) to apply in a case like this, it could not have intended that the payment of subsidies in the foreign commerce portion of the mixed service could be deemed to be unfair competition to the exclusively domestic operator." At other places in his recommended decision the Review Examiner referred to 506 and 605(a) as reducing or eliminating subsidy. However, it seems obvious that such statements were made on the premise of 805(a) being applicable. When the Review Examiner in a single instance made the assumption of 805(a) applicability, he did not state on the basis of such assumption that 506 and 605(a) would then as a matter of law eliminate subsidy as a basis for a claim of unfair competition, but rather he referred to the record as the basis for determining, given the assumption of 805(a) applicability, whether unfair competition would result under the circumstances of this case. See page 29 of the Review Examiner's Recommended Decision.

ling to imply such unawareness or disregard to Congress, and I do not adopt the theory.[1]

Therefore, the further question remains as to whether under the circumstances of this case unfair competition to an exclusively domestic operator would actually result from granting States' application.

My answer to this question is that I do not find that granting States' application would result in unfair competition to a carrier operating exclusively in the domestic service.

In reaching this conclusion, I have considered the opinion of the Court of Appeals for the District of Columbia in the *PFEL* case.[2] The facts of the *PFEL* case and those of the instant case differ in that the applicant in *PFEL* sought permission to operate unsubsidized vessels in a separate service in the domestic trade, and the applicant in this proceeding proposes to operate subsidized vessels in the domestic trade portion of mixed foreign and domestic voyages. The Court's conclusions in the *PFEL* case are not therefore necessarily dispositive of this case. However, it seems to me that the Court's statements as to unfair competition are as applicable to this kind of 805(a) situation as to the other.

In that case, Pacific Far East Lines, Inc. (PFEL), while operating a subsidized service between California and the Far East, had applied for 805(a) permission to operate in a separate service unsubsidized vessels between the Pacific

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1. A logical extension of this theory is that, if 506 and 605(a) as a matter of law bar consideration of evidence of factual subsidy advantage as an element of unfair competition in cases such as the instant one, then these sections would also bar consideration of evidence of factual subsidy advantage as an element of prejudice to the objects and policy of the Act. Thus, still assuming the applicability of 805(a), the holding of an 805(a) hearing, and 805(a) itself, would lose much of their meaning.

2. Pacific Far East Lines, Inc. v. Federal Maritime Board, 275 F. 2d 184 (D.C. Cir. 1960).

Coast and Hawaii. The Maritime Subsidy Board and the Maritime Administrator denied the application upon the following grounds as noted by the Court:

> "The Board found that if the application were granted, PFEL 'would be in a position to concentrate primarily on high value commodities, and would, in effect, "skim the cream" in this trade' between the Pacific Coast and Hawaii; that although PFEL's competition might divert less than 10% of Matson's tonnage, 'the diversion of Matson's revenues may be substantially greater'; that the diversion 'would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service;' and that the 'record fails to show the need for service in excess of that presently provided by Matson and other existing operators.' The Board concluded that 'to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act.' The Board thinks 'a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry,' and to which the Board considers them 'fundamentally entitled.' "[1]

The Court said with reference to what Congress had intended to prevent as unfair competition, "We think Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL."[2] The Court specifically rejected the Board's view that Matson was "fundamentally entitled" to retain its monopoly against a competitor subsidized in a different trade and concluded

1. 275 F. 2d at 185-86
2. *Id.* at 186

that Matson's need and the adequacy of Matson's service had nothing to do with whether PFEL's competition would be unfair.

The doctrine of "fundamental entitlement" has subsequently been rejected by the Maritime Subsidy Board[1] and was rejected by it in this proceeding below. I agree with the Subsidy Board in this regard. I do not believe that operators exclusively engaged in a domestic trade are automatically entitled to all the cargo that they need and have the capacity to carry, vis-a-vis subsidized carriers who seek permission to operate in such trade whether with subsidized or unsubsidized vessels. If such a doctrine were applicable there would be no reason in many cases to conduct an 805(a) proceeding at all because the inevitable decision would be a denial of any application that would result in the subsidized applicant carrying any cargo that an unsubsidized domestic operator desired and could possibly carry.

In deciding *the PFEL* case the Court of Appeals observed, "The Board did not find and the record does not show that PFEL would compete fraudulently; or that it would engage in cutthroat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying sub-standard wages, or by using sub-standard ships, or otherwise; or that it would compete in any way that is unfair according to accepted legal or ethical standards."[2]

None of those who have previously considered the facts of this case—the Hearing Examiner; the Board, or the Review Examiner—found that to grant this application would result in States' competing fraudulently, in a cutthroat manner, or in a way that is unfair according to accepted generally applicable legal or ethical standards.

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1. States Marine Lines, Inc.—Section 805(a) Application, MSB Docket S-57 (Sub. No. 5), 1 S.R.R. (Pike & Fischer) 325 (1961)

2. 275 F. 2d at 186

Neither do I find that such common law varieties of unfair competition will likely result from granting States' application.

Further, the Court of Appeals in the *PFEL* decision observed that "The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade. As the examiner said, 'Matson's witness admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy.' "[1]

Again, bearing in mind the factual differences in the *PFEL* situation and in the situation involved in this proceeding, I think that the Court's indication there that competitive advantage from subsidy is a relevant factor in determining whether unfair competition would result from granting an 805(a) application is a relevant factor to the unfair competition issue here. Thus, if it were shown here that as a result of granting the 805(a) permission the applicant subsidized carrier would have, from unremitted subsidy on operations in the domestic trade involved, a substantial competitive advantage over an unsubsidized exclusively domestic operator in that trade, a finding of unfair competition and a denial of the application would seem called for.

The Board in this case was correct, I think, in concluding that "Congress intended to provide substantial protection" for domestic operators as against subsidized operators. However, I believe the Board was not correct in stating that a finding of unfair competition must be based on evidence that the resulting advantage of the subsidized operator over

1. *Ibid*

the domestic operator is "such an overwhelming, unconscionable advantage as to constitute 'unfair competition.'" And, although the Board correctly stated that "in cases where the advantages of the subsidized operators are so great as to make it unlikely that the domestic operators would be able to compete effectively, then a finding of unfair competition with respect to the proposed service should be found", I do not believe the degree of advantage must be that great in order to reach the level of unfair competition. It seems sufficient for this purpose to find that the resultant situation is one of substantial competitive advantage to the subsidized operator.

The critical question then becomes, would States obtain as a result of granting its application a substantial competitive advantage over Matson in the California/Hawaii trade because of a subsidy element?

Here, an accurate perspective requires taking into account the respective roles of Matson and States in the California/Hawaii trade.

The over-all picture that one gets from a review of this proceeding is that Matson is, and has been for many years, by far the predominant carrier in the California/Hawaii trade. Some of the pertinent findings that have been made by the Examiners and by the Board in this respect are as follows.[1] Matson's annual fleet capacity was 2,457,193 measurement tons at the time of the hearing (H.E.). In recent years Matson has carried nearly 1,500,000 tons of cargo in each direction in the California/Hawaii trade (R.E.). During the twelve years of calling at Hawaii since 1950 by States and its predecessor, Pacific Transport Lines, Inc. (PTL), their annual westbound carryings have ranged

1. For convenience at this point the Hearing Examiner's findings are identified as "H.E.", the Board's as "M.S.B.", and the Review Examiner's as "R.E.".

between 7,926 short tons and 22,430 short tons (the latter was in 1961 when 14 voyages were made), but carryings eastbound have been substantially less (H.E.). Matson makes up to 18 round voyages in the California/Hawaii trade per month, but States calls about once a month at Hawaii in each direction (R.E.). Other carriers have entered the trade from time to time, but with little or no success against Matson's efficiency and established position (R.E.). There are apparently three or four small operators now in the trade, but their carryings are relatively little (R.E.).[1] Over the last decade or more, Matson consistently has carried about 98% of all cargo between Hawaii and the Pacific Coast; and it carries about 92% of all berth line cargo (M.S.B.). It carries about 95% of the liner cargo in the California/Hawaii trade, and an even greater portion of the bulk cargo (R.E.). In 1960 Matson carried all of the sugar and molasses going from Hawaii to California (H.E., M.S.B.). Matson also carries most of Hawaii's pineapple products eastbound to California (H.E., M.S.B.). States has not been able to participate in the carriage of pineapple products (it claims this has been because of Matson's connections with the principle shippers) or in the movement of bulk sugar (because Far East originated cargo is already in the holds when States' vessels call at Hawaii) (H.E.). If States' application were granted and its annual calls increased by 13 in each direction, States' carrying in the California/Hawaii trade would increase by an estimated 67,000 tons annually (apparently westbound); States' carryings would not equal 5% of Matson's westbound ton-

1. States (Opening Brief, p. 184) and Matson (Petition to Review Opinion and Order of the Board, p. 32) name the competing carriers other than States as American President Lines, Pacific-Hawaiian Steamship Company, Pacific Inland Navigation Company, and Oliver J. Olson Barge Line. See Hearing testimony of Matson witness, Norman Scott. Tr. 4173-78.

nage and only slightly more than that eastbound (M.S.B.). For each sailing by States every two weeks, Matson would have about 14 sailings per month; in a year's time Matson would carry 22 times as much cargo as States (M.S.B.). The amount of cargo that would be moved by States under the increased sailings plan would be 5% of the total cargo moving in the California/Hawaii trade as compared with 95%; carried by Matson (M.S.B.).

In view of the above findings, it is reasonable to conclude that Matson has not had substantial competition in the California/Hawaii trade, and that the competitive situation would be changed to some, but not to a great, extent by granting States' application. In previous 805(a) cases, the Federal Maritime Board indicated, correctly I think, that carriage by the applicant subsidized operator of only a small percentage of the total cargo movement in the domestic trade involved is not substantial competition and is a factor in finding no resulting unfair competition to an exclusively domestic operator therein.[1]

At the same time, it appears that if the application is granted, States' increased service in the domestic segment of its mixed voyages would be benefitted to some extent because of subsidy.

As found by the Hearing Examiner, the Mariner vessels States would use, newer and faster than Matson's, would not have been built without CDS and would not be operated by States without ODS. While subsidy proration, as the Board noted, abates subsidy advantage to an important degree, proration will not erase the facts that these vessels are in existence and are in trans-Pacific service on Trade Route 29 passing by Hawaii and that subsidy helped build

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1. States Marine Lines, Inc.—Sec. 805(a) Application, 6 F.M.B. 378, 384 (1961); Pacific Transp. Lines, Inc.—Sec. 805(a) Application, 4 F.M.B. 146, 148 (1953).

them and put them there. For States to use these vessels, built and maintained with the aid of subsidy in order to be competitive in foreign trade with vessels of foreign operators, to make calls at Hawaii in domestic trade incidental to its foreign voyages would not, however, seem to make States chargeable with unfair competition.

Matson contends that States would enjoy in its increased service in the California/Hawaii trade other benefits from CDS after abatement. By Matson's computations, States is able to acquire Mariners because of CDS at a substantially lower cost than Matson would be able to do so. Thus, assuming the minimum statutory down payment and amortization of the balance over the 25-year life of the vessel in both instances, Matson figures that its own average annual cost of acquisition of a Mariner would be $400,505 greater than States' minus States' projected annual subsidy refund of $57,800 per vessel, or an average annual net difference per vessel of $342,705 in States' favor. The Hearing Examiner reached the same conclusion. There appears, however, to be a defect in the procedures employed in reaching this result, the defect being in the basis used for comparison. Matson (and evidently the Hearing Examiner since he reached the same result) compared the cost to Matson of a Mariner to be used full time in the domestic trade with the cost to States of a Mariner to be used only fractionally in the domestic trade. A more equivalent basis for comparison would be the costs to Matson and States respectively of Mariners used to the same extent in the California/Hawaii trade. States made such a comparison, using three different methods of allocating vessel days to the domestic California/Hawaii trade for the 26 projected voyages. Two of these methods, including a full absorption accounting method, sponsored by States, show that States, after subsidy repayment, would have a disadvantage in comparison with

Matson. The third method, predicated on a full absorption allocation basis advanced by Matson in one of its exhibits, was described by Matson as "within the zone of reason"—it showed States' yearly cost advantage per Mariner over what Matson's cost would be for the same amount of use in the domestic California/Hawaii trade to be $15,894 per year. Thus adjusted on the basis of the most favorable to Matson of the three methods, States' subsidy advantage from acquiring the Mariners is relatively small, not approaching the figure of $342,705 per vessel per year computed by Matson and accepted by the Hearing Examiner.

Matson contends that States would have a further advantage from CDS, despite abatement under section 506, in that States would have the interest-free use of that amount of CDS which would ultimately be repaid because of the domestic operation of the Mariners. According to this view, repayment of CDS at a rate of $57,800 per vessel per year over the 25 year life of a Mariner would amount to $1,445,000 of CDS that States would have had interest-free use of until required to be repaid year by year as the vessel is used in the domestic trade. Matson sees this as a benefit from subsidy worth $37,500 per vessel per year, inasmuch as that is the amount of interest that would have to be paid on a 25 year loan of $1,445,000 at 5% repaid in installments at the same rate that CDS would be repaid. The Hearing Examiner also concluded that States would have such a $37,500 per vessel per year benefit from CDS in addition to other benefits referred to. It would appear correct, however, that if this item is to be attributed here to States as subsidy benefit, it be accounted for in the previous computations concerning States' cost in acquiring a Mariner. If this were done as to the method referred to above as most favorable to Matson,

the $15,894 per vessel per year advantage there attributed to States would be reduced to $8,630.[1]

Further, it may well be, as States contends, that Congress did not intend that the interest-free use of CDS money subsequently repaid under the 506 formula be considered as an element of unfair competition. The basis for such conclusion lies in the legislative history of the 1936 Act. Section 504 of the draft Merchant Marine Act of 1935, the forerunner of section 506 of the 1936 Act, included a specific provision for the payment of interest on unpaid installments of CDS, but this provision was subsequently eliminated. Since the CDS repayment provision of section 506 was enacted by Congress without this accompanying requirement of interest payment, that may be taken as an indication that Congress did not look upon the interest-free use of CDS as an element of advantage to be reduced or eliminated. Taking this view, that interest-free use of CDS money until repaid is not a source of unfair competition, the total advantage to States per Mariner per year is again $15,894 on the basis of the method most favorable to Matson of the three methods of comparison referred to above.

Matson also contends, and the Hearing Examiner agreed,

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1. Matson's exhibit 61 shows States' and Matson's annual interest cost in acquiring a Mariner as $127,375 and $286,000 respectively, a difference of $158,705. Adding $37,500, States' interest cost would be $164,875, and the difference would be reduced to $121,205. Only 19.37% of a Mariner's time in use would be in domestic use (States' exhibit 98), so the annual difference in interest cost attributable to domestic use would be $23,477 (*i.e.*, $121,205 x 19.37%) instead of $30,741 as now shown in exhibit 98. The difference in interest cost figure being $7,264 too high, on the basis of this adjustment ($30,741 — 23,477) and this item being one of the three items going into the overall annual difference in cost (depreciation plus CDS refund plus *interest*) in acquiring a Mariner as shown in exhibit 98, the overall difference in cost figure should on the same basis be accordingly reduced. Now shown as $15,894, it thus would become $8,630 (*i.e.*, $15,894 — 7,264).

that States has, because of its subsidized status, opportunities for tax deferment that Matson does not have. This is seen as a source of competitive advantage. I do not believe that States' following of procedures sanctioned by law in this regard would amount to unfair competition within the meaning of 805(a).

The Hearing Examiner found that States' ODS would amount to $2,481 a day, or $73,189 for the 29.5 days of the segment of each voyage that its vessels would be engaged in the California/Hawaii domestic trade, for a total of $1,902,914 yearly on 26 voyages. The Hearing Examiner was incorrect in attributing the $2,481 per day to ODS. Matson agrees that this figure is an aggregate of both ODS and CDS. Of this, $1,837 per day is ODS, and $644 per day is CDS. The estimated States' subsidy refund for both CDS and ODS in the California/Hawaii trade is $1,179,976 annually, leaving $722,938 annually after such refund. This is the figure that the Hearing Examiner found would be the subsidy remaining yearly to help States carry on its 26 voyages in the California/Hawaii trade. States points out that $164,975 of this is applicable to California/Midway cargo. Also States calls attention to the fact that, of the freight that would be carried by it in the California/Hawaii segment of the 26 mixed voyages, 61.5% of the tonnage would be made up of cargo in the foreign trade. Thus, States emphasizes that of the $1,902,914 CDS and ODS originally allocated on an annual basis to the California/Hawaii segment of 26 voyages on Trade Route 29, only $557,963 or 29.3% is left to help carry on that segment a cargo that by volume is 61.5% foreign. In its reply brief to exceptions to the Hearing Examiner's recommended decision,[1] Matson concedes that the subsidy that would after

1. At p. 42

abatement remain to States in the California/Hawaii trade would be beneficial to States also in providing its foreign trade service. Finally, it must be remembered that although the discussion in this paragraph as to residual subsidy has been with regard to the total *26* voyages, present and projected, we are concerned with an application for authorization of only *13* voyages in addition to those already authorized and whether granting an additional 13 voyages would result in unfair competition. Therefore, the foregoing projections as to residual subsidy on 26 voyages should be cut down accordingly in seeking to determine the result of the additional 13 voyages. With these various adjustments, the $722,938 figure found by the Hearing Examiner in this respect would be reduced considerably.

Matson argues that States' 26 calls at Hawaii incidental to its service on Trade Route 29 would be profitable, if at all, only on an incremental accounting basis, whereas profitability should be tested on a full-absorption basis, allocating joint costs to the domestic segment of such mixed voyages as well as to the foreign segments. Consequently, Matson used two methods of full absorption accounting producing respectively the results that States would lose annually $905,458 or $1,280,416 on these 26 calls. Matson asserts that such losses would be covered by the subsidy paid States on the trans-Pacific voyages incidental to which the domestic calls would be made, and that such subsidy would be, therefore, a crutch for the domestic calls at Hawaii. States counters with arguments that in this situation incremental accounting is realistic and appropriate and should be used, and that full absorption accounting is not required by law to be used in determining whether subsidy support would be given to domestic service. States also introduced two methods of full absorption accounting that

produce the results respectively that States would enjoy profits from the domestic service alone of approximately $258,000 or $41,000 annually. The disparity in results reached by the Matson and States methods of full absorption accounting apparently flows from different methods of allocating fixed costs, such as from the inclusion by Matson, but the exclusion by States, of $546,000 of administrative and general expenses, including advertising, among costs to be allocated, and from the inclusion by Matson, but the exclusion by States, of interest expense among costs to be allocated. The Hearing Examiner concluded that a full absorption, rather than an incremental, accounting method is appropriate to a determination of whether the domestic portion of States' voyages would bear its proper burden of the total cost. He found that, based on full absorption accounting, States would incur net losses annually on the domestic segments of the 26 mixed voyages in question of $1,280,416 or $905,458, depending on which of two methods is used—precisely the figures produced by Matson's two methods. The Hearing Examiner did not refer to the methods of absorption accounting advanced by States. It will be noted again that this finding is with regard to all 26 voyages, and not merely as to the 13 additional ones for which authority is sought by the application.

It is clear that States calls at Hawaii would be profitable on an incremental accounting basis. Whether these calls would be profitable on a fully-allocated cost basis is not so clear. Unfortunately, no impartial accounting study in this regard is to be found in the record. Particularly with regard to the designation of items as fixed costs of doing business by an enterprise, and as to the proportions in which they are properly allocable to different operations, there are several methods of cost allocations, producing a variety

of results. It is not surprising that Matson's allocations in this regard showed States' domestic operations to be unprofitable and that States' allocations showed them to be profitable — by different methods of full absorption accounting.

However, because the Hearing Examiner found that States' California/Hawaii service would be unprofitable on a full absorption basis and the Board stated as fact that States' service in this respect could pay for itself on an incremental cost basis only, and there is substantial evidence of record to support this conclusion, it is accepted. At the same time I agree with the Board that such a finding is not automatically dispositive of the case.

The Board correctly pointed out that, besides the fact that sections 506 and 605(a) abate to an important degree the privileges and advantages provided to the subsidized operators, there are other equalizing forces that would operate to help prevent States from having an unfair advantage from its proposed increased service. These equalizing forces, as the Board noted, include on the one hand statutory and contractual restrictions upon the subsidized contractor and, on the other, government aid in various forms and in substantial measure to domestic operators.

The net result, however, even after subsidy abatement and the operation of equalizing forces, is that States would apparently have some residual benefits from subsidy in the proposed additional voyages in the California/Hawaii trade. I do not find from the record, however, that States would have because of residual subsidy a substantial competitive advantage over Matson. The picture of the California/Hawaii trade is one of growth—even by Matson's standards it is expected to continue to grow at a rate of from 1% to 2% each year. This projected growth, coupled with other findings noted above concerning Matson's pre-

dominance in this trade as compared with States, makes it appear reasonable to expect that Matson would within 5 years be carrying as much cargo as it now does. Meanwhile, effective competition would be increased modestly in this trade as a result of granting the application. But effective competition is not to be equated with unfair competition.[1]

I therefore do not find that to grant States' application would result in unfair competition to any person operating exclusively in the coastwise or intercoastal service. Accordingly, I will not deny States' application on unfair competition grounds. However, the evidence presented by both sides on this question appears sufficiently close that I believe further consideration of the issue in the light of experience would be warranted after the passage of a reasonable period of time. Direction for this to be accomplished is provided later in this decision.

V

PREJUDICE TO THE OBJECTS AND POLICY OF THE ACT

As already indicated, I do not find that granting States' application would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service. Nevertheless, the question remains whether granting the application would be prejudicial to the objects and policy of the Act.[2]

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1. Pacific Far East Line, Inc. v. Federal Maritime Board, 275 F. 2d 184, 186 (D.C. Cir. 1960).

2. If to the contrary it were found that unfair competition would result from granting the application, a finding also of prejudice to the objects and policy of the Act would be indicated inasmuch as unfair competition obviously is contrary to the objects and policy of the Act. However, the objects and policy of the Act embrace more than fair competition, and the fact that it is not found that unfair competition would result from granting the

(a) Provisions of the Act concerning policy and objectives.

The objects and policy of the Act are set out in sections 101 and 210. Section 101 declares it to be the policy of the United States to foster the development and encourage the maintenance of a merchant marine which is sufficient to carry the domestic water-borne commerce and a substantial portion of the water-borne foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such commerce; capable of serving as a naval and military auxilliary in time of war or national emergency; owned and operated under the United States flag by United States citizens as far as practicable; and composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with citizen personnel. Section 210 states as objectives, first, creation of an adequate and well-balanced merchant fleet to provide shipping service on all routes essential for maintaining the flow of United States foreign commerce, the vessels of which are to be designed so as to be readily and quickly convertible into transport and supply ships in time of national emergency; second, ownership and operation of such a fleet by United States citizens so far as practicable; and, third, planning of vessels designed for the best and most complete protection of passengers and crew against fire and marine perils.

(b) Objects and policy concerned in this case.

It is apparent from the evidence, the arguments advanced by the parties, and from the decisions previously reached in this proceeding that the concern here is whether the

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application does not of itself preclude a finding that approval of the application would be prejudicial to the objects and policy of the Act for other reasons.

grant of States' application would be prejudicial to the development and maintenance of an adequate and well-balanced merchant marine or prejudicial to the provision of ocean transportation services needed by the shippers and the geographic areas involved. More specifically, would grant of States' application have a significant detrimental impact on the competitive position of the domestic operator in the California/Hawaii trade, Matson? And would it, on balance, have a significant adverse effect on present and/or projected service in the California/Hawaii domestic trade or on the U.S./Far East foreign trade on Trade Route No. 29?

In addition, a number of subsidiary and related propositions have been in contention at different stages of this proceeding, along with the somewhat separate contention of Matson that approval of the application would also result in subsidy diversion, prejudicial to the objects and policy of the Act.

(c) Impact on the competitive position of Matson.

The Hearing Examiner concluded that as a result of granting permission to States for the proposed additional 13 voyages, and based upon States' estimate of the total annual cargo it would in that event carry in the California/Hawaii trade, States would divert cargo on those additional voyages from Matson's planned fleet in such quantity as to cause Matson a net annual loss of earnings, after income tax, of from $550,000 to $846,000.[1]

States has challenged this finding as being based on the premise that all of the cargo which it is estimated States would obtain would be diverted from Matson. States argues

1. The Review Examiner, on the other hand, concluded that Matson's estimates as to reduction in net revenues, from which the $550,000 and $846,000 were derived, are unacceptable because based on unrealistic assumptions, including an assumption of a drop in patronage not supported by the record.

that the trade is expanding at a rate (at least by from 1% to 2% annually in the westbound trade by Matson's estimate) such that the cargo growth alone would in five years more than cover the cargo that it is estimated States would carry on its additional voyages. States further argues that the Matson "penetration" studies, on which the finding of diversion was based, are invalid because they assumed a planned Matson fleet, the composition of which was changed after the studies were made. And States contends that the estimated additional cargo it would carry could not be diverted from Matson anyway because Matson's high utilization of capacity would not permit Matson to carry such cargo.

Matson responds that the projected growth in trade will not occur over night and that in the meantime adding the States voyages would overtonnage the trade and that the cargo taken by States would be that which Matson would otherwise carry; that States' argument of invalidity of the penetration studies is a quibble, since the result would be a substantial loss to Matson, regardless of a changed intermediate composition of its fleet between that of the time of the studies and that which is planned; and that the evidence shows Matson's fleet would be adequate now and in the future to carry the cargo that States estimates it would obtain with the additional sailings.

The Board estimated that States, by adding the proposed calls at Hawaii in the domestic trade, would increase its carryings in that trade by not more than 67,000 tons of cargo annually (apparently westbound).[1] The Review

1. Matson points out that 67,000 tons figure is for the 13 additional calls westbound only, that the inclusion of eastbound cargoes raises the figure to 85,000 tons for these 13 calls, and that States' California/Hawaii carryings on all 26 calls both directions would be 189,000 tons.

Examiner agreed with this tonnage figure, and noted that Matson had been carrying nearly 1,500,000 tons of cargo annually in each direction in the California/Hawaii trade. The Board further found that if the application were granted States' carrying in this trade would not equal 5% of Matson's westbound tonnage and only slightly more than that eastbound; that for each sailing by States every two weeks Matson would have about 14 sailings per month; that in a year's time Matson would carry about 22 times as much cargo as States; and that States' cargo with 26 calls at Hawaii would be about 5%, and Matson's about 95%, of the total cargo moving in this trade.

Although it appears that granting States permission to make the requested 13 additional calls at Hawaii in the domestic trade would result in States obtaining some 85,000 tons of cargo eastbound and westbound, it is unlikely that Matson would lose a corresponding amount of cargo, as seems assumed by the loss of earnings figures advanced. The Board concluded that Hawaii's economy would expand at an annual rate of from 5 to 10%, resulting in an annual cargo growth of more than enough in a single year to cover the estimated increase in States' carryings. Matson's Vice-President, freight division, estimated cargo growth in the trade at from 5 to 10% for the succeeding five-year period,[1] a rate of growth of 1 to 2% annually, particularly because of population increase. Even at the latter rate, within five years States' increased carryings would be more than offset by growth of cargo in the trade. Matson points out correctly, I think, that States' increased carryings would not all come immediately from growth in the trade. Even so, it does not follow that all cargo that States would gain in this trade other than from trade growth would be cargo

1. Matson witness, Norman Scott, Tr. 4190

subtracted from that which Matson otherwise would carry. It appears that Matson's high utilization of vessel capacity has meant that from time to time it was unable to carry cargo when offered in this trade.

At the same time, it may be, as Matson charges, that much of the cargo States would carry on its additional calls would consist of the more profitable items for carriage, including automobiles, household goods in sea vans, and MSTS cargoes. If that turned out to be the case, the fact that Matson may not in time suffer any net loss in tonnage would not tell the whole story, for Matson's revenues could still be down if the lost cargoes were replaced in considerable part by carryings of less profitable items. However, it is not clear to what extent Matson would lose cargoes in these categories to States as a result of States' increased service. States may obtain more such cargoes because of inability of Matson to carry them. The Hearing Examiner noted evidence that from time to time automobile shippers have been unable to get space on Matson's vessels when it was wanted. Also, Matson's containerization program may reduce its conventional space relatively, so that cargoes that are not readily susceptible to containers would seek conventional space from States—household goods in sea vans, for example. The fact that States would obtain more MSTS cargoes with additional calls at Hawaii in the domestic trade would not be the result of any effort on States' part to "skim the cream" in this trade, inasmuch as MSTS cargoes are allocated on an indiscriminate basis to carriers in the trade. Further, it is reasonable to expect that with more frequent sailings shippers of general cargo would increasingly ship with States, and that its cargo mix would have a lower proportion than it now has of the enumerated high net revenue, more easily handled items. At any rate,

although the Hearing Examiner thought automobiles and household goods in sea vans would be diverted to a greater degree if the application were granted, the Board was not persuaded that States would engage only in so-called "cream-skimming" practices, and the Review Examiner concluded that the evidence does not support the fear that States would take a large proportion of high-rated cargo from Matson.

While as a result of granting the application there will probably be some diversion of cargo and there may be some loss of earnings to Matson (perhaps more than States estimates but less than Matson estimates), especially in the period immediately after States institutes the increased service, I do not believe that these facts alone require a finding of prejudice to the objects and policy of the Act. To reach such a conclusion would involve application of the doctrine of fundamental entitlement, but that doctrine has been rejected, and in my judgment should not be applied in determining the issue of prejudice to objects and policy of the Act any more than it should in determining the issue of unfair competition.[1]

I think the Board was correct in saying that the question of prejudice must be weighed in the light of public interest, and that the entire competitive relationships involved must be weighed in determining how the public interest will be served best.

Also, as the Board observed, impact from granting an 805(a) application on the competitive position of domestic carriers in the domestic trade involved will vary with the particular circumstances of different cases. The amount of protection required for the unsubsidized domestic oper-

1. See discussion in connection with "Unfair Competition," *supra*, p. 37.

a[illegible]or thus is a matter of judgment, and depends in part on the circumstances of its position in the trade relative to that which the applicant would have if its requested permission is granted.

The findings of the examiners and the Board as to Matson's greatly predominant position relative to that of States, now and after grant of the application, have been summarized above. Matson has been so-well established, so long in this trade, and has such shipper connections, according to the record, that the estimated amounts of diversion and revenue loss would not seem to pose a serious threat to Matson's competitive position in this trade. I agree with the Board's conclusion that States' additional sailings would not have such a competitive effect on Matson as to lessen substantially the ability of Matson to compete for available cargo. I do not find in this case that there would be such a significant detrimental impact on the competitive position of this domestic operator in the California/Hawaii trade as would be prejudicial to the objects and policy of the Act.

(d) Effect on service.

Not only the applicant, States, but also those intervening in this proceeding, San Diego and Hawaii, assert that Matson's service in the California/Hawaii trade is inadequate.

The findings and conclusions of the examiners and the Board in this regard should be considered. The Hearing Examiner, while not concluding that Matson's service has been insufficient to accommodate the day-by-day requirements of the trade, referred to a number of factors which may be taken as signs of service inadequacy. Thus, it was found that States obtains westbound cargo on its present 13 voyages in the domestic trade without solicitation—automobile manufacturers book space on States westbound ves-

sels as much as six weeks in advance of sailing dates; household goods in sea vans are booked two to three weeks in advance; and shippers of other cargoes book with States by telephone when they have offerings. The Hearing Examiner also recognized that shippers of used automobiles had on occasion been unable to get space on Matson's vessels when they wanted it, but he concluded that Matson had done much to alleviate that situation. The Board found that States carries westbound only that amount of cargo which Matson is not able to accommodate, and it referred to evidence of record showing a scarcity of space aboard Matson ships westbound, the unusually high utilization of Matson's capacity and complaints indicating that Matson's services do not fully meet the needs of many shippers. The Review Examiner found that Matson runs a "tight service," frequently experiencing only about 5% unused space per vessel, which he characterized as "an unusually high vessel utilization," and that the trade by no means can be considered over-tonnaged. The Board also noted that freight rates in this trade are very high. The Hearing Examiner, observing that competition or the lack of it nearly always colors one's business activities and that Matson may not always have been as acutely alive to the needs of patrons as it might have been, noted that some shippers had expressed dissatisfaction with Matson's service. At the same time he found that island shippers were generally satisfied with Matson's service. He found that some instances of Matson's inability to provide space were caused by unusual conditions such as labor disturbances, but that others were the result of various kinds of neglect and still others were simply the inability to furnish space at the time requested. It was also observed by the Hearing Examiner that the "free space" figures put into evidence by Matson to prove

that it has sufficient space available for needs of the California/Hawaii trade may not have been accurate in all relevant respects. The Hearing Examiner emphasized Matson's service to the trade since 1882, serving all the islands and carrying bulk, along with other, cargoes. Noting that Matson had discontinued service to San Diego,[1] the Hearing Examiner found that the record fully supports the need for States' service at San Diego.

As to future service in the California/Hawaii trade, the Hearing Examiner detailed an $8,000,000 fleet improvement program Matson had taken steps to institute. He stated that Matson would continue to furnish some direct service to the Neighbor Islands and would also provide container service by barge, which he concluded would mean more service for these islands. The Hearing Examiner also stated that most island witnesses were afraid that the regularity of Matson's service to them might be disturbed if the States' application is granted. He further observed that States had not in the past, and would not, if its application were granted, carry bulk cargo, but would benefit from carrying a small number of high revenue, easily handled commodities. The Board said it was not persuaded that States would engage only in so-called "cream-skimming" practices, and the Review Examiner found that the evidence does not support the fear expressed by Hawaii that States would take a large proportion of high-rated cargo, and thereby force Matson to raise its rates on lower-rated commodities. The Review Examiner found "incredible" the contention that increasing States' service by about one call a month would make such inroads on Matson that Matson's ability to serve the trade would be jeopardized. The Hearing Ex-

1. Matson discontinued its San Diego service as of February 23, 1960. San Diego witness, William R. Daly, Tr. 3271.

aminer was of the opinion that although Matson's revamping of its fleet would withdraw some tonnage from active service, there is no reason to believe Matson will not have sufficient tonnage to meet the Hawaiian trade's growth requirements in the immediate future. Even so, the Hearing Examiner recognized that there will probably continue to be instances of Matson being unable to lift offerings for Hawaii when tendered. And, noting the unusual dependence of Hawaii on water transportation, he observed that Hawaii should not be entirely at the mercy of Matson. The Board concluded that States' additional service would not overtonnage the trade but would help "remedy some of the tightness of Matson's closely run service." The Board also concluded that permitting States a greater opportunity to engage in the Hawaii trade likely would provide sufficient cargo for regular calls at San Diego, and that such direct service to San Diego would not only furnish needed service to that port but would aid in meeting national defense requirements in facilitating the movements of military cargo from an important military base to outlying defense areas in the mid-Pacific and the Far East.

While there may be generally sufficient carrying capacity for the California/Hawaii trade eastbound, from a consideration of the above findings, which have substantial support in the record, I have serious doubt that there has been adequate service westbound in this trade. Further, although Matson has instituted fleet improvement, the planned fleet is to have an annual capacity somewhat below that of the Matson fleet as it existed while the record was open.[1] In view

1. Annual capacity of Matson's present fleet, 2,457,193 measurement tons; of its planned fleet, 2,449,118 measurement tons. Matson's Reply Brief to States' and San Diego's Opening Briefs, p. 90, citing Exhibit 110, sheet 6, Tr. 5692.

of the anticipated growth of the trade as discussed above, it does not appear that the planned facilities of Matson would accommodate the needs of that trade. Additional service therefore seems justified.

I have considered Matson's argument and Hawaii's expressed fear that granting States' application would or might result in impairment or curtailment of Matson's service; but, bearing in mind the predominance of Matson and its established position in the trade plus the projected growth of the trade, this does not seem a likely result. Rather than being merely a "cream-skimming" operation, the proposed increased States' service at this juncture offers promise of remedy for the "tightness of Matson's closely run service," as the Board expressed it. The actual effect of States' additional calls at Hawaii on service in the trade would appear in practice of course. If the consequences were to eventualize as Matson and Hawaii forecast them, those events of course would weigh against further permission for States to operate in this trade while receiving ODS. The desirability of prescribing a procedure for reviewing the results of granting the application after a reasonable period is again obvious.

Matson makes the point that States' primary obligation is to the foreign trade which it is subsidized to serve. Matson then asserts that the increased availability of California/Hawaii cargo to States would weaken its efforts to serve the California/Far East trade on Trade Route 29. The examiners and the Board all found against Matson in this respect.[1] Their findings on this point do not appear

1. "There is no satisfactory proof that States has done this in the past or will do so if the application is granted." Hearing Examiner's Recommended Decision, p. 25. "There is no evidence to establish that in the past States has, nor in the future, States will subordinate its obligation to serve the foreign trade for the

to be an incorrect reading of the record, and I affirm them. In the same vein, Matson further argues that States' reservation for domestic cargo of some 40% of its vessel space on westbound voyages calling at Hawaii is inconsistent with States' primary obligation to the subsidized foreign trade. Matson cites the Board's decision in the Grace Line portion of the *Puerto Rico* case,[2] as holding that Grace could not validly under the Act devote 70% of its vessels to the domestic trade. Matson contends that the instant case differs from the *Grace* case only in degree and that on the basis of the holding in that case the same result should obtain here — to grant the application would be contrary to the objects and policy of the Act. The Maritime Subsidy Board distinguished the *Grace* case from the instant case, pointing out that in the *Grace* case many carriers were already providing service in the trade, the service was overtonnaged or nearly so even without Grace's additional service, and the rates between the mainland and Puerto Rico were relatively low because of substantial competition, none of which factors were found to be present in the case at hand. And, whereas the Board characterized the distribution of domestic to foreign trade that would have resulted from grant of the Grace application as "grossly disproportionate," it concluded that the States' ratio of domestic to foreign trade in this case would not be so disproportionate as to

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benefits to be derived in the domestic trade." Final Opinion and Order of the Board, p. 32. "The record would not support a finding that the plan of operations, with the 13 additional calls at Hawaii, will result in impairment of States' ability to serve the foreign trade, as contended by Matson." Review Examiner's Recommended Decision, p. 32.

2. Grace Line Inc., American Export Line, Inc., U.S. Atlantic-Puerto Rico Service, M.S.B. Docket Nos. S-140 and S-141, 2 S.R.R. (Pike & Fischer) 1101 (1963). The Secretary of Commerce affirmed the Grace Line decision. Grace Line Inc., M.S.B. S-140, 3 S.R.R. (Pike & Fischer) 870 (1964).

run counter to subsidy concepts which are designed primarily to permit our flag carriers to compete effectively with foreign carriers in the foreign trade. Certainly the ratio of domestic to foreign cargo that an 805(a) applicant would have if its application were granted is a pertinent consideration to be weighed with others in determining whether the grant would be prejudicial to the objects and policy of the Act. Under the circumstances of this case, I agree with the Board's conclusion that the ratio expected for States would not be so disproportionate as to call for a denial of its application on the ground of prejudice.

Not only would granting the application in this case not be detrimental to States' service in the Far East trade, but contrariwise there is reason to expect that benefits to the foreign commerce would accrue from the grant. Thus, the Board concluded that it is possible that States' increased service to San Diego in the California/Hawaii trade would generate additional cargo in both Hawaii and the Far East, promoting rather than prejudicing the objects and policy of the Act. And the Board found that increasing the number of States' California/Hawaii sailings would increase the opportunity for generating more combination cargo to Hawaii and the Far East from the mainland, and to the Far East from the mainland to Hawaii.

(e) Alleged "diversion" as prejudice.

Matson, referring to its unfair competition argument that to grant the application would result in States' California/Hawaii service receiving direct and indirect subsidy support in various ways, asserts that each of these ways constitutes a diversion of subsidy into the domestic trade. Thus, Matson contends all the elements of unfair competition arising out of such subsidy support also amount to prejudice to the objects and policy of the Act. Neither of the examiners nor

the Board found that granting the application would result, on the basis so advanced, in prejudice to the objects and policy of the Act. The contentions of Matson concerning the various alleged means of subsidy support for States' proposed domestic service have been examined in the discussion on unfair competition, *supra*. Had I determined that States' proposed domestic service would be supported by subsidy so as to constitute unfair competition, the argument that grant of permission for such service while States receives ODS would be prejudicial to the objects and policy of the Act would of course be persuasive. However, my conclusion that there would not be subsidy support of States' service from the means alleged by Matson such as to amount to unfair competition leads me also to conclude that there would not be subsidy "diversion" into the domestic trade such as would be prejudicial to the objects and policy of the Act.

(f) Other considerations.

Besides consequences referred to above that would not constitute prejudice to, but would promote, the objects and policy of the Act, granting States' application should also result in a sizeable reduction of subsidy to States, estimated by the Board to be $800,000 annually in ODS alone. Also a further degree of competition would be present in the trade. While the application is not granted in order to accomplish these results, they will not prejudice the objects and policy of the Act, to say the least.

At the same time I wish to emphasize that approval of this application does not mean that it is felt desirable to encourage subsidized operators to build up ocean transportation service in our domestic trades. Ideally, we could wish for adequate service in those trades entirely by unsubsidized operators. However, each case of an 805(a) application

by an operator of vessels in the mixed trades enumerated in sections 506 and 605(a) must be considered on its own facts to determine whether approval of the application would result in unfair competition to a domestic operator or be prejudicial to the objects and policy of the Act. Obviously when Congress in sections 506 and 605(a) specified certain mixed trades in which subsidy *may* be paid provided subsidy is prorated according to formulae set out in those sections it contemplated that it would be in the public interest for subsidized carriers to provide service in those trades in some cases. Also the execution of authority under 805(a) to grant or deny written permission to carriers to operate in domestic trade while receiving ODS necessarily involves the exercise of administrative discretion.

Weighing all the factors here, I have concluded, on balance, that the objects and policy of the Act would not be prejudiced in this case by approval of the application. Rather, it would be in the public interest to approve the application, particularly when provision is made, as is done, for a review of the case at the end of a reasonable period to see whether the permission should be continued.

VI
CONCLUSIONS

Section 805(a) of the Merchant Marine Act of 1936, as amended, requires the States Steamship Company to obtain written permission in order to increase its service, as proposed, between California and Hawaii.

The Matson Navigation Company operates "exclusively in the coastwise or intercoastal service" within the meaning of section 805(a) of the Act.

I do not find that granting States' application would result in unfair competition to any person, firm or corporation

operating exclusively in the domestic service.

I do not find that granting States' application would be prejudicial to the objects and policy of the Act.

Therefore, States is authorized to increase its present service in domestic trade to the extent that vessels operated on Trade Route 29 in its subsidized "C" service, supplemented by those in its subsidized "B" services, may call at Hawaii not to exceed 26 calls westbound and 26 calls eastbound per year.

There are obvious handicaps to decision-making in proceedings of the kind before me. Whether to grant a section 805(a) application depends upon ultimate findings as to what the consequences of granting it would be. Evidence is received as to what the situation is at the time of the hearing, and on this basis projections are made as to what the situation would be if the application were granted. Uncertainties are necessarily involved in a judgment as to what future consequences will be. If unfair competition would not (or would) result next month, or next year, from a decision to grant the application, what would be the situation several years hence? If it would not be prejudicial to the objects and policies of the Act to grant the application today, would the grant today be followed by prejudicial consequences at some future time?

Because the consequences of granting the application cannot be known with certainty and may change from time to time, I think it best not to grant States' application for an indefinite period without provision for review. The situation, both with respect to the *existing* authorization and to the additional authorization covered by the present application, should be reviewed and appropriate action taken at the end of a reasonable period within which experience can be gathered as to whether the States' voyages in the

domestic trade actually constitute unfair competition to a domestic operator or are prejudicial to the objects and policy of the Act.

Therefore, at the expiration of a three-year period, the Maritime Administration will take prompt steps to schedule an appropriate (and expeditious) proceeding in order to determine on the basis of accrued actual experience whether the authorization for 26 States voyages, or any part thereof, should continue in effect.

SO ORDERED

/s/ JOHN T. CONNOR
John T. Connor
Secretary of Commerce

July 6, 1965

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1. The Maritime Subsidy Board, and the Federal Maritime Board before it, have in previous decisions granted authorizations on less than an unlimited basis, either by limiting the time of authorization, or by making the authorization subject to subsequent reconsideration and, if shown to be warranted, recission or modification. American Export Lines, Inc.—Sec. 805(a) Application Docket S-134, 1 S.R.R. (Pike & Fischer) 919 (1962); Pacific Transport Lines, Inc.—Sec. 805(a) Application, Docket S-18 (Sub. No. 1), 4 F.M.B. 146 (1953). See also T. J. McCarthy Steamship Co.,—Sec. 805(a) Application, Docket S-67, 6 F.M.B. 3 (1960); American President Lines, Ltd.—Unsubsidized Operation, Route 17, Docket S-17, 3 F.M.B.—M.A. 457 (1951).

Appendix D

The full text of Section 805(a), Merchant Marine Act, 1936 (46 U.S.C. § 1223(a)) is as follows:

"(a) It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171-1182 of this title, or to charter any vessel to any person under section 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board [*] or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is

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*Section 304 of Reorganization Plan No. 7, effective August 12, 1961, 75 Stat. 840, abolished the Federal Maritime Board, and Section 202(b)(1) of said Plan transferred all functions under Section 805(a) to the Secretary of Commerce.

made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

"If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."

Appendix E

In the United States District Court for the District of Hawaii
Civil Action No. 2235
Entered: 8/17/64.

United States of America,
Plaintiff,

v.

Alexander & Baldwin, Ltd.; Castle & Cooke, Inc.; C. Brewer & Company, Ltd.; American Factors, Ltd.; and Matson Navigation Company,
Defendants.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 20, 1964; and the parties hereto, by their respective attorneys, having consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect to any such issue;

Now, therefore, before the taking of any testimony and upon said consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

This Court has jurisdiction of the subject matter hereof and the parties hereto. The complaint states claims against

defendants upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and under Section 7 of the Act of Congress of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act.

II

Defendants Castle & Cooke, Inc. (herein called "C&C"), C. Brewer and Company, Limited (herein called "Brewer") and American Factors, Limited (herein called "Amfac") shall sell within sixty (60) days all of the shares of capital stock of Matson Navigation Company (herein called "Matson") owned or controlled by said defendants C&C, Brewer and Amfac and their subsidiaries.

III

Defendants C&C, Amfac and Brewer and their subsidiaries are enjoined and restrained from acquiring any assets or stock or other share capital of defendant Matson or entering into any contract or conspiracy with any defendant to control defendant Matson.

IV

Defendant Alexander & Baldwin, Inc. (herein called "A&B") is enjoined from selling any of its stock in Matson to (1) defendants C&C, Amfac, or Brewer; (2) Theo. H. Davies & Company, Limited (herein called "Davies"); (3) California and Hawaiian Sugar Refining Corporation (herein called "C&H"); (4) any shipping line calling regu-

larly at Hawaiian ports; (5) any corporation regularly engaged in shipping pineapple from Hawaiian ports; (6) a subsidiary of or any person owned or controlled by any of the above; (7) an officer, director or executive employee of any of the above.

V

Defendants C&C, Amfac and Brewer and their subsidiaries are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person who is serving as a director, officer or executive employee of Matson or any subsidiary thereof.

VI

1. Defendant Matson and its subsidiaries are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person who is serving as a director, officer or executive employee of (1) defendants C&C, Amfac, or Brewer, or any subsidiary thereof, or (2) Davies, or (3) any other American shipping line calling regularly at Hawaiian ports, or (4) any subsidiary of Davies or such shipping line.

2. Defendant Matson and its subsidiaries are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person (other than a director, officer, or executive employee of A&B or any subsidiary thereof) who is serving as a director, officer or executive employee of (1) C&H, or (2) any corporation shipping pineapple or sugar from Hawaiian ports, or (3) any subsidiary of C&H or such corporation.

VII

Defendants A&B, C&C, Amfac and Brewer are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person who is serving as a director, officer or executive employee of (1) any other of said defendants, or (2) Davies.

VIII

Defendant A&B and its directors, officers and employees are enjoined and restrained from discussing with any director, officer or employee of C&C, Brewer, Amfac or Davies which ocean carrier or carriers shall be used by C&C, Brewer, Amfac or Davies for their shipments of products or goods from or to the Hawaiian Islands.

IX

Each director, officer or executive employee of defendant A&B is enjoined and restrained, while he is simultaneously a director, officer or executive employee of C&H, from taking part in any discussions concerning, and from voting on, any proposals for the carriage of sugar by Matson or by any carrier competitive with Matson.

X

Defendant A&B is ordered to grant to any person purchasing pineapple from it or its subsidiaries the right to select the port to which such pineapple shall be shipped and the carrier on which such shipment shall be made.

XI

Defendant Matson is enjoined and restrained from employing as its agent for the soliciation of freight on Oahu (1) C&C, Amfac, Brewer or Davies, or (2) any of their subsidiaries, or (3) any person employed for the solicitation of freight by any other shipping line competitive to Matson and calling regularly at Hawaiian ports.

XII

For the purpose of securing compliance with this Final Judgment, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any of the defendants, made to its principal office, be permitted (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendants relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendants, and without restraint or interference from them, to interview officers or employees of defendants, who may have counsel present, regarding any such matters; and, upon such request, defendants shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XII shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XIII

At any time after ten (10) years from the date of this Final Judgment plaintiff may move the Court for an order that A&B shall divest itself of all capital stock and other

proprietary interest in Matson then held by A&B. Upon the filing of such a motion the Court shall order such divestiture unless A&B shall show to the satisfaction of the Court either, that substantial competitive conditions exist in the transportation of freight from Hawaii to the West Coast of the United States, or, if substantial competitive conditions do not exist, that this situation does not exist as a result of A&B's stock and other proprietary interest in Matson.

XIV

This Final Judgment shall not constitute a bar or an estoppel to plaintiff from instituting and prosecuting, at any time, against defendants Matson or A&B a proceeding charging that A&B's stock or other proprietary interest in Matson, including the stock acquired pursuant to this Final Judgment, violates the antitrust laws.

XV

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: August 17, 1964.

/s/ MARTIN PENCE
United States District Judge

Appendix F

Financial Results of States' California-Hawaii Service on 26 Voyages—Estimated Year

	Exhibit 65 Basis (Gross Revenue Allocation)		Exhibit 66 Basis (Revenue-Ton Mile Allocation)	
	Dollars Allocable to Cal.-Haw.	% of Total Foreign and Domestic Allocable to Cal.-Haw.	Dollars Allocable to Cal.-Haw.	% of Total Foreign and Domestic Allocable to Cal.-Haw.
1. Gross Revenue	$ 3,939,456	24.40	$3,939,456	24.40
2. Direct Cargo Handling and Port Expense	(2,015,478)	30.92	(2,015,478)	30.92
3. Net to Vessel Revenue	1,923,978	19.96	1,923,978	19.96
4. Operating Differential Subsidy (ODS)	874,045	24.40	694,937	19.40
5. Net to Vessel Revenue Plus ODS	2,798,023	21.17	2,618,915	19.81
6. Vessel Expense	(1,590,124)	24.40	(1,264,279)	19.40
7. Vessel Depreciation	(367,842)	27.71	(257,622)	19.43
8. Administrative and General Expense (including Advertising)	(460,217)	27.53	(420,457)	25.16
9. Interest Expense	(480,280)	39.87	(402,039)	33.39
10. Domestic Trade Reduction (ODS and CDS)*	(1,179,976)	85.10	(1,179,976)	85.10
11. Net Profit (Loss) Before Taxes	$(1,280,416)		$ (905,458)	

*Of which $873,686 is ODS reduction and $306,290 is CDS refund.

Record Sources: SC81 (Exhibit 65); SC82 (Exhibit 66); STr. 5004, 5180-87, 5213-17, 5226-27, 5234-36, 5239, 5904-05.